Slaughter Act to put a stop to the mistreatment of animals.

Mr. President, I thank the chairman and ranking member of the Agriculture Appropriations Subcommittee for their support in this every important effort.

STATUS OF APPROPRIATIONS BILLS

Mr. BYRD. Mr. President, as Members are aware, all 13 appropriations bills have cleared the Senate Appropriations Committee.

Four bills have been sent to the President for signature, of which three have been signed into law. The Defense, Homeland Security, and Legislative Branch appropriations bills have been signed, and the Interior appropriations bill is awaiting signature.

Five appropriations bills are in conference. These are the Military Construction, Energy and Water Development, Labor-HHS-Education, Foreign Operations, and Transportation and Treasury appropriations bills. The Military Construction appropriations bill completed conference yesterday, and the Energy and Water Development conference met today.

Four appropriations bills are awaiting completion of Senate action—Agriculture, VA–HUD, Commerce-Justice-State, and the District of Columbia. The Agriculture appropriations bill is being considered on the floor today.

Mr. President, the Senate should proceed to process these four final bills on the floor and to send them to conference with the House. This will protect our rights as Senators to offer amendments. The Senate should process 13 individual appropriations bills, and avoid an omnibus appropriations bill. Omnibus appropriations bills have the effect of shoehorning large segments of the Federal Government into one monstrous bill. Members' rights to amend legislation are severely limited, and they will not be able to know what they are voting for or against. Omnibus appropriations legislation also has the result of bringing the White House to the table, which has the effect of blurring the distinction between the responsibilities of the executive branch and the constitutional responsibilities of the legislative branch to develop legislation under the separation of powers. This is no way to legislate.

I thank and commend the distinguished chairman of the Appropriations Committee, Mr. STEVENS, for his steadfast pursuit of the goal of processing 13 individual appropriations bills. The Senate would not be at this stage of processing the appropriations bills, if my friend, the Senator from Alaska, had not pursued this matter with such vigor on his side.

Again, I thank my distinguished and able colleague, Mr. STEVENS, for his efforts.

RURAL UTILITIES SERVICE BROADBAND LOAN PROGRAM

Mrs. CLINTON. Mr. President, I support the effort spearheaded by my colleagues, Senator BURNS and Senator DORGAN, and have serious objections to the Bush administration's proposal to gut the only national program we've ever enacted to get broadband high speed Internet connectivity deployed across our country.

It was just last year that Congress passed, as part of the farm bill, the only national broadband deployment incentive I am aware of that has been enacted by the Federal Government—a program that was supposed to provide over $700 million in loans a year to help get broadband to all parts of the country—$700 million in loans a year to help create and bring jobs to rural parts of the country—$700 million a year to help improve health care and education delivery to places like Upstate New York, rural Montana, North Dakota, Alaska, Iowa, and all across the country—$700 million a year to help improve emergency communications systems so that our first responders can actually receive those calls for help.

From a fiscal perspective, you couldn't ask for a better deal. It takes just $20 million in Federal resources to leverage over $700 million in loans—$700 million in loans plus at least another 20 percent in investment from the private sector. Has the program been popular? You better believe it has. In just 9 months since the Rural Utilities Service published regulations for the broadband loan program, the RUS has received applications that total over $1 billion. Our rural communities across the country recognize the promise of new telecommunications technologies.

Our rural communities and the coalition of Members from Congress that helped create the RUS broadband loan program in last year's farm bill aren't the only ones who recognize the promise of broadband. Look what other countries are doing.

A recent study by the International Telecommunications Union, the UN's telecommunications agency, confirmed what many of us already know. South Korea is leading the world in numbers of high-speed Internet connections per capita, with Hong Kong and Canada coming in at second and third. Where is the U.S. a distant 11th.

And these other countries are outspending us on broadband infrastructure. Sweden has set aside some $800 million on broadband deployment in rural areas of the country. France is following suit, having announced not long ago its plans to invest $1.5 billion on broadband infrastructure over 5 years. In Japan, through the majority government owned Nippon Telegraph and Telephone, the country is in the middle of a huge fiber-to-the-home project across the country. In Korea, the government is laying out some $15 billion to provide an optical fiber connection to 84 percent of homes by 2005.

We are falling behind. I don't know about the rest of my colleagues, but I think that's a huge problem. People in upstate New York know it's a huge problem. There is little disputing that a nation with ubiquitous broadband will be more efficient and productive than a nation without it. Just a couple weeks ago, the Wall Street Journal had a story titled, What's Slowing Us Down?, with the byline, ''Broadband is seen as a critical part of the national economy. Yet the U.S. lags behind other countries.''

The Wall Street Journal piece points out that, ''Rising rates of high-speed Internet access are expected to trigger everything from increased sales of new computers to a massive rise in worker productivity.'' A recent Brookings Institution study found that universal broadband access could add $300 billion a year to the U.S. economy. Forgoing a major broadband rollout, the Wall Street Journal notes, might not only hinder economic growth, but also worsen an already bleak picture for battered telecommunications and high-tech industries.

That explains the letter that a host of companies and high-tech associations have sent to Senators BENNETT and KOHL, the managers on this important bill. This letter pleading to restore funding of the RUS broadband loan program is signed by 3M, Alcatel, Cisco Systems, Corning, Intel, Nortel Networks, Siemens, and so many others who recognize the importance of this modest investment.

But they are not the only ones we're hearing from. I am hearing from small carriers across New York who need assistance to get broadband deployed to their rural areas—companies like Castle Cable Television in Alexandria Bay, NY who want to do the right thing—who recognize the potential of broadband to bring jobs and better services to their communities.

So what is our plan, our national strategy to help ensure broadband gets deployed across America? What is our plan to ensure America's competitiveness? Well, the administration's plan and the one that's come out of committee in the Senate is to crush the one permanent broadband deployment program the Federal government has ever enacted.

I understand that we have replaced $10 million that would leverage over $350 million in broadband loans with $10 million in grants. That doesn't make any sense. I am not suggesting we not do grants—but it doesn't make fiscal sense to saw off $10 million that will leverage over $350 million in loans for a simple $10 million in grants.

And it certainly doesn't make sense to take away the Rural Utilities Service's administrative funding and capacity to process and review the pending applications. Rural communities across the country, like Alex Bay in New York, need these resources to create and attract jobs. And our country needs to make these investments if we're to stay ahead of—or at least competitive with—South Korea, Hong Kong, Japan, and our neighbors to the

north, Canada, who are making the investments in broadband to move ahead.

I commend my colleagues, Senators BURNS and DORGAN, for their leadership in helping restore the full funding level for the RUS broadband loan program, and I ask the managers of this bill and for the administration to join in what should be a national strategy to deploy broadband across America.

Mr. KOHL. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. ROCKEFELLER. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. ROCKEFELLER. I ask unanimous consent to speak as if in morning business.

Mr. BENNETT. Mr. President, reserving the right to object, could I ask the Senator from West Virginia how long he intends to speak?

Mr. ROCKEFELLER. I would say 15 to 18 minutes.

Mr. BENNETT. I have no objection.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. ROCKEFELLER. Mr. President, I thank my distinguished friend and colleague.

LEAK OF STAFF DRAFT MEMO

Mr. ROCKEFELLER. There have been statements made on the floor today—which I was not here to listen to because I was in a Commerce Committee meeting—expressing concern, outrage, et cetera, about what is happening with the Senate Intelligence Committee's inquiry into the prewar Iraqi intelligence. We have heard charges that a draft memo taken from the Intelligence Committee spaces and provided to the media somehow represents a plan to discredit what the Intelligence Committee is doing and to politicize the inquiry. These charges are inaccurate and unfortunate. I wish to speak to them as vice chairman of that committee.

I would suggest to my colleagues that there is in fact reason for concern today, but it is not because of the content of this draft staff memo—a memo which, for the record, was not approved by me, was not given to any other member of the Senate Intelligence Committee, nor to any other staff person, my own staff on the Intelligence Committee, nor to any other member of the Senate, nor anybody else. It was an internal draft memo. It happens all the time in the Senate. At some point very soon the committee and the Senate are going to have to explore the chain of events surrounding this draft memo since it raises serious questions about whether the majority is obtaining unauthorized access to private internal materials of the minority, and who made the decision in this case to leak the draft of an unofficial memo to the press.

It is disturbing that individuals are seeking, perhaps or perhaps not, to score political points with a draft paper describing the rights of the minority to push for a full and fair review of the issues of the committee and that the memo is being so grossly mischaracterized to try to deflect attention from the real issue.

More importantly, the concern this body should feel today is that the Intelligence Committee is not conducting a thorough and in-depth inquiry into all aspects of the intelligence process leading up to the war in Iraq. This body should be disturbed that 5 months after we started asking questions, we are still going, in essence, hat in hand to the administration to try to get the documents we need to conduct this review.

I most sincerely regret the impression that the draft memo has apparently given to some of my Republican colleagues, but it clearly reflects staff frustration that the Senate Intelligence Committee's investigation has not tackled all of the tough issues, and frustration with the difficulties we have had in obtaining information from the administration. It should come as no surprise to anyone that there is tension on the committee. I have said publicly for months that the committee must review not only the accuracy of prewar intelligence on weapons of mass destruction and terrorism but also the use or misuse of that intelligence by senior policymakers in this administration. This is fundamental to answering the questions the American people have about how we got into this war. But at every turn, the chairman has made it clear that the inquiry will be limited to reviewing the prewar intelligence against the low threshold of a standard called reasonableness. We have a basic disagreement. These kinds of things happen in the Senate.

I was pleased last week ended with the chairman and myself standing side by side, as we should, insisting on the committee's need for evidence wherever it might be located. But the information we have requested to date is only part of our work. It should be obvious to all that our committee still has much to do to assure that our inquiry into prewar intelligence about Iraq's weapons of mass destruction and links to terrorism fulfills our responsibilities to the Senate and to the American public.

I want to take a minute—it is important for me to do so—to describe these responsibilities because I am not sure all of our colleagues know. The committee's responsibilities come to us from the Senate. We don't make them up. The Senate created the Senate Select Committee on Intelligence in 1976. The measure that established it, S. Res. 400 of the 95th Congress, remains the Senate's charter to us as a committee. It is very specific.

S. Res. 400 was not a casual measure. It was the product of years of interest in improving oversight of intelligence, a major investigation chaired by Senator Church, reports of several standing committees, about eight or nine, and extensive floor consideration. It is not up to the 17 of us who happen now to be on that committee to make up the boundaries of our responsibility. They are given to us and written out very clearly.

S. Res. 400 begins by stating its purpose: To create a Senate select committee ''to oversee and make continuing studies of the intelligence activities and programs of the United States Government.''

The Senate did not leave the term ''intelligence activities'', the object of oversight, to the imagination of generations of members of the Intelligence Committee. Instead, the Senate carefully defined the term ''intelligence activities'' in section 14 of the resolution to include ''the collection, analysis, production, dissemination, or use of the information.''

The five elements of intelligence activity—that is collection, analysis, production, dissemination, and use—represent the full cycle with which the committee must be concerned. That is our charter. If we examine analysis of information without considering the collection of it, we fail in our responsibility. If we examine both of them but not the production of reports and the dissemination of information, we fail in our responsibility. If we stop at dissemination and do not examine the use of intelligence, we will equally fail in our responsibility. That examination is what I have been pushing for and it is what I will continue seeking.

I have heard it said that policy is the responsibility of other committees. Of course, other committees have responsibilities relating to national security policies. But so do we. Our mandate from the Senate is clear. S. Res. 400 also says the information which is subject to the committee's oversight includes information relating to foreign countries and to ''the defense, the foreign policy, the national security, or related policies of the United States.'' It is broad. It is thorough.

We should be committed as a committee to developing a full record. The joint letters the chairman and I wrote last week insisting the administration provide us with the necessary documents and interviews are a step in the right direction which I very much appreciate. But there is a lot more to be done. Even if we might disagree about the evaluation of evidence, we should put the full weight of the committee behind obtaining all the facts our members believe to be necessary for a complete inquiry. For me, that means all communications, not just a limited list, about Iraqi weapons of mass destruction and terrorism intelligence between the Intelligence Committee and policymakers, including the White House.

Without those, our record will not be complete. We cannot assess, for example, whether intelligence agencies were

pressured to conform to the views of policymakers unless we know what policymakers were asking of these agencies. This is a key objective of this inquiry, and we are in danger of completely missing it.

Albeit in strong language, what staff suggests in the draft memo—which, again, nobody on the committee saw and nobody else had seen it until it was leaked, and then everybody has it—is that the minority work with the majority to get as far as we can in this effort. That was our purpose—to work as far as we can and be as successful as we can in this effort, and if the majority continued to refuse, then the minority should be prepared to point out shortcomings consistent with the rules.

It is misleading to suggest this possible approach comes as a surprise to anyone in this body. I have been clear with the chairman for months that there is growing interest among many members of the committee in pursuing a separate investigation. It is not a course I choose to follow. Many Senate Democrats are on record in support of an independent commission. We voted it down the other day. I voted against it, but many Members did not; they voted for it. I am on record opposing that approach and I continue to oppose it. But, it is an option that cannot be ruled out.

Exploring or asserting the rights of the minority under the Intelligence Committee rules in no way amounts to politicizing intelligence. A substantive disagreement is not grounds for charges of partisan politics; it is a difference of approach, a difference of opinion.

I have worked for months within the committee to try to get these critical questions answered. It was not until the committee Democrats, in fact, exercised their rights under the rules and forced a meeting in June that the committee first discussed the parameters of a review. Democrats, some of them, wanted a formal investigation and ultimately agreed to the majority's less formal, less structured approach because the issue was too important to descend into political bickering.

In August, I wrote the chairman with a list of 14 areas where I thought the committee needed to do more work. I got no response. In September, after press reports that the chairman was planning to wrap up the interim investigation by the end of September, I wrote again to express my belief that we had more work to do and set out a framework for how we should approach the task we faced. I got no response. I met with the chairman on numerous occasions and got no response.

Then, 2 weeks ago, after reading press stories from the chairman describing a committee report that I had not seen and a deadline I knew we could not meet, I sat down with the chairman—again, we are good friends, and we will remain that way—to talk about where the inquiry was and what was left to do. In that meeting, I provided him with draft letters to the different agencies that owed us documents and interviews which the committee staff, under the control of the majority, had long since asked for, months ago. I cosigned a tough letter, along with the chairman, to the head of the Central Intelligence Agency, pressing him to provide materials requested by the committee staff—fundamentally one which his staff director directs. When I provided the majority with a list of nine examples of the use of intelligence we must have to understand the interplay between policymakers and the intelligence community, I was turned down.

The fact is that I have approached the majority in every way I know how—in private letters, in meetings, in committee meetings, in public statements, on the Senate floor, imploring the majority to work together with us and imploring the majority to meet the committee's fundamental responsibility to investigate the potential misuse of intelligence by policymakers leading up to the war in Iraq. My entreaties have been to no avail, eliciting either no response or, worse yet, public statements by the chairman unilaterally announcing that the committee will, in fact, not pursue the critical issue of use.

The majority has left the Senate minority with two choices: Either abandon what we believe is a fundamental obligation in this body to the American people as is laid out in the Senate resolution creating us, or, reluctantly, part ways and use our rights as a minority to get the job done on our own. I prefer not to do that. It is not my nature. I prefer not to do that. That calls for members working together and calls for following committee rules and following our charter.

Throughout this difficult situation, I have remained committed to the committee's investigation. I have been vocal in my appreciation of the absolutely excellent job done to date by the staff on the aspects of the investigation they have been asked to perform, which is reviewing the prewar Iraqi intelligence. They have done a superb job, absolutely superb job.

I still strongly believe the committee can and should do this job. I am confident that, presented with the facts, the American people can and will judge this administration fairly. For my part, I have and I will continue to support the President when I believe he is right. I had the same approach with the previous President, President Clinton. When I believed he was wrong, I went after him really hard, on steel and other things. But when he was right, I said so. On the other hand, I will also challenge and question the President and his administration when I think they are in error. That is my duty. I am an elected Senator and I represent my people. That is my job as a Senator. It is my responsibility as vice chairman of the Senate Intelligence Committee.

I conclude by saying I am also confident that the members of the Intelligence Committee can put aside their differences and continue with the tough tasks facing members. Maybe it took this to somehow embarrass all of us enough to bring us together. I want the result to be that we do this together under the Senate resolution. I hope we can put this behind us.

I suggest to the chairman that the full committee meet again this week to bring us to a point of consensus. We must pursue this inquiry to the end. These are extraordinarily important matters we are discussing, not to score political points on either side but because we must make sure we fix problems and provide our country with the best intelligence possible. That is our job.

I yield the floor.

Mr. BENNETT. Mr. President, we are back on the bill. I see some Senators have come to the floor and I ask those who are here if they intend to offer amendments.

Mr. DORGAN. Mr. President, in response to the Senator from Utah, it is my intention to offer an amendment. I would like to speak about a subject that is going to prompt the amendment and then discuss with my colleague, Senator BURNS from Montana, who will be joining me with an amendment. There are several ways we might offer this amendment. I would like to have a discussion with Senator BURNS and also with Senator KOHL and Senator BENNETT about the specific amendment because my hope is we can work things out as this bill is on the floor.

It is my intention to offer an amendment with my colleague, Senator BURNS from Montana. I would like to speak about it, and he would probably want to speak as well.

Mr. REID. Mr. President, if I may respond, the Senator from California is here. In fact, she left a very important conference committee to come here because she feels strongly about her amendment. She has an amendment to offer and she is not in a position to agree to any time. She will probably take an hour, an hour and a half. So it will be the first lengthy amendment on this bill.

Mr. BENNETT. I understand the Senator from California had the desire to offer her amendment, and I encouraged her to come to the floor to do so. Now she has come.

I ask the Senator from North Dakota how long he might want to take because I want to accommodate the Senator from California. I say that as if I control the time, which I clearly do not, but the Senator from Nevada has suggested the Senator from California be allowed to offer her amendment and I want to be as accommodating as I can be to all Senators.

Mr. DORGAN. Might I inquire of the Senator from Utah? First of all, I would like to speak for perhaps 5 to 7 minutes initially. I guess the Senator from Montana may want to speak for a

very short time. Following the presentation by Senator FEINSTEIN and perhaps after a meeting I will attend, I will speak at greater length, if I could be recognized—I would be very brief—in order to describe to the Senator from Wisconsin and the Senator from Utah what Senator BURNS and I want to try to achieve this afternoon on this piece of legislation.

I think we can introduce that very shortly and then perhaps discuss it at greater length at a later time.

Mr. BURNS. If the Senator from North Dakota will yield.

Mr. DORGAN. I yield.

Mr. BURNS. It is a good idea to give us time to work it out to the agreement of both sides. This can be done. We are going to have to offset it. We would work with the chairman and the ranking member.

I don't need any time prior to Senator FEINSTEIN speaking. We can do that after because she has come, with all good intentions, to offer her amendment, and I think she should be allowed to do so.

The PRESIDING OFFICER. The Senator from Utah.

Mr. BENNETT. In that case, Mr. President, I ask unanimous consent that the Senator from North Dakota be recognized for 7 minutes and, further, that he be followed by the Senator from California.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

The Senator is recognized for 7 minutes.

Mr. DORGAN. Mr. President, as I said, I will speak about this at greater length this afternoon, but I did want to advance the topic Senator CONRAD BURNS and I wish to advance, an amendment on this bill dealing with something called the Broadband Loan Program.

Let me describe what that is. Let me describe it by telling you I was recently in my hometown, a town of fewer than 300 people, in southwestern North Dakota. I visited a home there. I stopped by to say hello, and there was a woman in that home who had a little device on her counter. It looked different to me. It had a camera mounted on it. It was no bigger than a shoe box. She had a bracelet hanging on a little round projectile on it.

I said: Well, what are you doing there? She said: I am taking a picture of this bracelet. I said: Why are you doing that? She said: I sell on eBay.

Here in my hometown is a woman who sells on eBay, and she takes a picture of those products and puts them on her computer. She told me she has been supplementing her income by doing business on eBay.

It describes the need, even in a town of 300 people, for computer access, the need for broadband, the need for the big pipes in which you can do business on the Internet in a way that does not take you a day to download something others are downloading in 5 minutes.

So the question of the building out of broadband to rural communities all across this country, including rural areas especially, is a very important question. Because if you do not build out broadband capability, then what happens is you leave some parts of the country behind. You have an Internet divide. You have people on the right side of it and you have people on the wrong side. The people on the wrong side will never have any economic development opportunities because when you talk to somebody about building a business in this town, they will ask: Do you have the capability to connect us by computer with some reasonable speed? When you say: No, we don't, they will say: Well, so long. We're going elsewhere. That is why this is so important.

Let me describe quickly what we did. In the farm bill, a group of us—Senator BURNS, myself, and others—included a provision that deals with a broadband loan program. It is the first and the only program in this country designed to spur the development of the buildout of broadband capability to rural areas. It was scheduled to use $100 million in direct spending to subsidize $3.5 billion of loans over the 6 years of the farm bill.

Pursuant to that, RUS, down at the Department of Agriculture, put together the first 2 years $40 million, and they announced they would make $1.4 billion in loans available. As a result of that, they set a July 31 deadline. They received $1 billion in loan applications because we have people with interests and businesses really interested in building out this broadband capability to rural areas, very much like the old REA program.

Prior to REA, there was no electricity on America's farms. They were dark. When the Sun went down, you could not plug into anything because no one built electricity infrastructure out to America's farms. We created the Rural Electrification Act, and all of a sudden America's farms got electricity. It created dramatic explosions in productivity on America's farms. That is what this is about: the buildout of the infrastructure for broadband to our small rural communities and to our farms.

So what happened was the USDA put together this program. The loans were requested. We have applications for loans. They came in by July 31. What happened, however, is the language that is included now in this appropriations bill eliminates the broadband section of the farm bill—it eliminates it—and in its place puts a $9.1 billion appropriation, which is less than half the amount that should have been available this year.

If we move down this road, it appears to us the money that has been applied for, for loans will not be at this point continued. They will have to start over. You will have half the money. There is no assurance the additional money will be available in future years because this will be an appropriated amount rather than being in the farm bill which authorized this for 6 years.

This is very important. This is about the haves and have-nots in this country with respect to access to the Internet and with respect to broadband capability. If we decide that access to the Internet, with pipes that are of reasonable circumference so you get some decent speed, does not matter to rural areas, we will have, in my judgment, economic development only in areas of the country where we have broadband, and small towns and rural areas are going to be told: So long, Charlie. Just tough luck. You are not going to be developed because we have a digital divide, and we support that digital divide. That is a terrible message to come from the Congress.

What I would like to do, with my colleague, Senator BURNS, is to work with Senator BENNETT and Senator KOHL to try to deal with this problem that is created in the appropriations bill. We have two problems. One is a language problem. We need to restore the language that existed in the farm bill that calls for this Broadband Loan Program. We should not kick that out in this appropriations bill, No. 1.

No. 2, we should restore the funding that was there that was promised and upon which applicants now have applied for $1 billion in investment funds to build out broadband capability to rural areas of the country.

I know rural areas are sometimes looked at as kind of the ''back 40.'' Well, it is not the ''back 40.'' It is a wonderful part of this country. It is small towns and good families trying to make a living, often in circumstances where they are losing population. These are places with strong schools, places in which you can raise kids without worrying about their safety, with good neighbors, good places to be. But if we decide, as a country, in the age of information technology and information revolution, that only the big cities are going to have the aggressive, robust buildout of broadband, then we are consigning rural America to a pretty desperate struggle for their future. That is not what we want. That is not what Congress decided.

Congress already made this judgment when it passed the farm bill. It said: Rural America matters as well. Small towns matter, too. That is what the Congress decided. As a result of that decision, it made a specific, deliberate investment to say we are going to fund, through loans, and we are going to encourage, through loans, the buildout of broadband infrastructure to help small towns and family farms in this country.

That promise was well underway, and now what has happened is, in this bill, we have a problem that derails it. We want to fix it. I want to work with my colleagues, Senator BENNETT and Senator KOHL, to do that. I will return this afternoon to see if we can do that.

I yield the floor.

The PRESIDING OFFICER (Mr. CORNYN). The Senator's time has expired.

The Senator from California is recognized.

Mrs. FEINSTEIN. Thank you very much, Mr. President.

AMENDMENT NO. 2083

(Purpose: To improve the operation of energy markets)

Mrs. FEINSTEIN. On behalf of Senators LUGAR, LEVIN, HARKIN, CANTWELL, BOXER, LEAHY, WYDEN, DURBIN, and HOLLINGS, I send an amendment to the desk.

The PRESIDING OFFICER. Without objection, the pending amendment is set aside. The clerk will report.

The bill clerk read as follows:

The Senator from California [Mrs. FEINSTEIN], for herself, Mr. LUGAR, Mr. LEVIN, Mr. HARKIN, Ms. CANTWELL, Mrs. BOXER, Mr. LEAHY, Mr. WYDEN, Mr. DURBIN, and Mr. HOLLINGS, proposes an amendment numbered 2083.

Mrs. FEINSTEIN. I ask unanimous consent that reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

(The amendment is printed in today's RECORD under ''Text of Amendments.'')

Mrs. FEINSTEIN. Mr. President, this amendment has to do with providing some regulatory oversight over energy trading. It has to do with closing the Enron loophole. It has to do with providing transparency. Energy trades today are not subject to the 2000-passed Commodity Modernization Act. Rather, these energy trades take place electronically, take place in secret, without transparency, with no records kept, with no audit trail available, and with no regulatory oversight to prevent fraud and manipulation in energy trading.

I would like, first of all, from the Derivatives Study Center, to indicate and read a couple of paragraphs from the letter they have sent, which I think defines the issue very well.

I quote:

This regulatory assistance comes at a critical time. According to the Federal Energy Regulatory Commission's Director of the Office of Market Oversight, ''energy markets are in severe financial distress.'' Along with the decline in credit quality in these markets, the loss of confidence and trust has led to a ruin in the liquidity and depth of these markets. This legislation will go a long way to address this problem.

Then he defines what derivatives are. This is important for Members to know. It is complicated. We went through this once before. I would like to give you this definition because it is a good one:

Derivatives are highly leveraged financial transactions, allowing investors to potentially take a large position in the market without committing an equivalent amount of capital. Moreover, derivatives traded in over-the-counter markets are devoid of the transparency that characterizes exchange-traded derivatives, such as futures, and this lack of transparency introduces a greater potential for abuse through fraud and manipulation.

That is exactly what happened. He goes on to say:

Derivatives are often combined into highly complex, structured transactions that are difficult, even for the seasoned securities trader and finance professionals, to understand and price in the market. Enron used such over-the-counter derivatives extensively in order to hide the nature of their activities from investors. The failure of Enron and the demise of other energy derivatives dealers has had a devastating impact on the level of trust in energy markets.

That is a good definition of what we are trying to do, why we are trying to do it, and what we are trying to involve.

Now I would like to read into the RECORD a portion of a letter from Eliot Spitzer. Mr. Spitzer is the attorney general of the State of New York. That is the place where many of these cases are now coming to trial.

He says:

I firmly support your efforts to make energy markets competitive and protect those markets from fraud and manipulation. The bill sponsored by Senators Feinstein, Levin, and Lugar, and under consideration as an amendment to the proposed 2004 agricultural appropriations bill, is a major step toward both goals.

He goes on to say:

The amendment makes a major contribution to competitive energy markets by initiating an electronic information system to be operated through the Federal Energy Regulatory Commission. This system will provide open access to comprehensive, timely, and reliable wholesale electricity and transmission, price and supply data, greatly expanding the choices of both buyers and sellers. In addition, the reliability of market information would be markedly improved by the amendment's general prohibition on manipulation of the purchase or sale of electricity or the transmission services needed to deliver electricity, and by specific prohibition of the round-trip trading manipulation used so effectively to inflate electricity prices to the public's injury.

This is a letter from the attorney general of the State of New York. As such, it places an imprimatur of correctness, of need, and of value on the amendment that we introduce today.

Now, what is in that amendment? Specifically, the amendment would improve price transparency in wholesale electricity markets. The amendment directs the Federal Energy Regulatory Commission to do just what Mr. Spitzer said it would do: to establish an electronic system to provide information about the price and availability of wholesale electricity to buyers, to sellers, and to the public. This provision is actually similar to the transparency provision offered by my colleague from New Mexico, Senator DOMENICI, in the Energy bill.

Secondly, this legislation would prohibit round-trip electricity trades. What is a round-trip trade? It is the simultaneous buying and selling of the same quantity of electricity at the same price, in the same location, with no financial gain or loss. In other words, no commodity ever changes hands. Again, this is similar to a provision that Senator DOMENICI offered during consideration of the Energy bill. Round-trip or wash trades are bogus trades. No electricity changes hands but the profits from the trades enrich the bottom line of a company's financial report.

In fact, I think we had one company—I believe it was CMS—say that 80 percent of their balance sheet in a given year was from bogus trades. And there is nothing we can do about it? Does anyone believe that is right? I think not. I don't think the American people do, and that is one of the reasons these markets are so decimated.

Next we would increase penalties for violations of the Federal Power Act and the Natural Gas Act. Maximum fines for violations of the Federal Power Act would be increased from $5,000—that is nothing to a big company—to $1 million. And maximum sentences are increased from 2 to 5 years. Remember, these rip-offs were tremendous. Just look at the people plea-bargaining from Enron, look at what they did, look at the amounts of money they fraudulently compromised.

This language is identical to section 209 of the Senate-passed Energy bill. Current fines are extraordinarily low and, therefore, provide no deterrence to illegal activity.

We also amend the Natural Gas Act to do essentially the same thing. Senator DOMENICI, in his substitute electricity title to the Energy bill, increased the fines in the Gas Act but he did not do so in the Federal Power Act. We would do both in this amendment.

Next the amendment would prohibit manipulation in electricity markets. Manipulation is prohibited in the wholesale electricity markets, and FERC is given discretionary authority to revoke market-based rates for violators.

Strangely enough, manipulation of energy markets is not prohibited in current law. Can you believe that? Manipulation of energy markets is not prohibited in current law. This would add language to part 2 of the Federal Power Act to do just that.

Most importantly, this bill would repeal the Enron exemption and allow the Commodities Futures Trading Commission, which has oversight over virtually all other trading, to monitor the over-the-counter energy market.

This would repeal what happened in 2000 when Enron pushed the Commodities Futures Modernization Act exemption for large traders in energy commodities. And it would apply antimanipulation and antifraud provisions of the Commodities Exchange Act to all over-the-counter trades in energy commodities and derivatives.

In my view, when Congress exempted energy from the Commodities Futures Modernization Act of 2000, it created the playing field for the western energy crisis of 2000 and 2001. The western energy crisis cost millions of people millions of dollars in my home State of California. So this is a charge I am making. When this Congress permitted

the Enron loophole to exist in the Commodities Modernization Act, they created the loophole for the playing field that Enron and others used to manipulate the western energy markets.

Next, our bill would provide the Commodity Futures Trading Commission the tools to monitor over-the-counter energy markets. Over-the-counter energy trade in energy commodities and derivatives performs a significant price discovery function, including trade on electronic trading facilities. Our amendment requires large, sophisticated traders to keep records and report large trades to the Commodity Futures Trading Commission. This doesn't change the law. It only applies the law that exists for futures contracts to over-the-counter trades in energy markets.

We would limit the use of data. This requires the CFTC to seek the information that is necessary for the limited purpose of detecting and preventing manipulations in the futures and over-the-counter markets for energy, to keep proprietary business data confidential, except when used for law enforcement purposes. This does not require the real-time publication of proprietary data. It does not.

This would have no effect on non-energy commodities or derivatives. The amendment would not alter or affect the regulation of futures markets, financial derivatives, or metals. We have specifically stated on page 20 the following:

The amendments by this title have no effect on the regulation of excluded commodities under the Commodity Exchange Act.

In addition, we state:

The amendments made by this title have no effect on the regulation of metals under the Commodity Exchange Act.

Mr. President, my colleagues may be asking themselves why I continue to press this cause. Here I note that Senator LEVIN has come to the floor. I want the Senate to know how helpful the Senator from Michigan has been in working on this complicated issue. He has spent hours and hours of his time. His staff has worked with my staff in evolving this measure. We have carefully vetted it. I believe we really know what we are doing here.

The energy crisis in the West demonstrated that, without Federal oversight, a business becomes solely concerned with its bottom line and not with any sense of ethical behavior; and arrests and convictions to date have clearly documented this to be the case.

Californians are still paying the price of this unethical behavior. I make the point that we are not talking about one bad player in the California market. This goes way beyond Enron. It extends to others as well—to Reliant, Dynegy, Williams, AEP, CMS, El Paso Merchant Energy, Duke, Mirant, Coral, Sempra Energy Trading—unfortunately, in my own State—Aquila, the City of Redding, Morgan Stanley Capital Group, Pacificorps, and to the Puget Sound Energy.

We believe California was duped out of $9 billion. The Federal Energy Regulatory Commission has illustrated its inability to refund California the money it is owed by recently recommending settlements that in no way, shape, or form reflect the damage that was caused to both consumers and the economy of the largest State in the Union. In fact, FERC settled with Reliant on August 29, allowed them not to admit wrongdoing, and fined them $836,000. That was $836,000 for rules of conduct that cost the State $13 million—hardly fair.

This disproportionately low fine gives credibility to the fact that the price one would have to pay in penalties, if caught manipulating the market, is worth the risk since the benefits of not getting caught far outweigh any penalty that may be levied upon a company.

I think it is pretty clear that this disproportionately low fine gives credibility to the fact that the price one would have to pay in penalties, if caught manipulating in the market today, is worth the risk. There is no deterrence, since the benefits of not getting caught far outweigh any penalties that may be levied on a company. That is what we are trying to change.

If I left any doubt in my colleagues' minds about the widespread manipulation that took place during the western energy crisis, let me point out some recent examples of a case that was brought by the Securities and Exchange Commission against David Delaney, a former chief executive with two of the most prominent divisions of Enron.

On October 30, 2002, Delaney pled guilty to insider trading. The SEC brought charges against him for selling millions of dollars in Enron stock at a time he knew it was being manipulated. While these charges appear to be financial in nature, the underlying facts of the case were that Enron was engaged in manipulative business practices, especially in California.

In March of 2003, the FERC staff report on price manipulation in western markets: Investigators said they suspected Enron was using price information obtained in regulated deals to manipulate trades in unregulated energy derivative markets.

In one instance, Enron manipulated the price of physical gas, upward, then downward. Although the price change in the physical markets was only 10 cents per million Btus, Enron profited due to the effect that this small change in the physical price had on its large financial position. Enron earned more than $3 million in the unregulated over-the-counter markets, while losing only $86,000 on the physical sale of natural gas.

I think it is important to note that the FERC report also states:

Enron's corporate culture fostered a disregard for the American energy customer. The success of the company's trading strategies, while temporary, demonstrates the need for explicit prohibitions on harmful and fraudulent market behavior and for aggressive market monitoring and enforcement.

That is what we are trying to provide in this amendment. That is what FERC says is missing.

Our amendment would provide greater oversight over these markets so that fraudulent and manipulative behavior could be prevented. It would increase the penalties if, in fact, a company engaged in fraudulent or manipulative behavior, and it would outlaw all types of manipulation including round-trip trading, wash trades, false reporting, churning, and deliberately withholding generation. All of the Enron trading strategies, such as Ricochet, Death Star, Get Shorty, Fat Boy, Non-Firm Export, Load Shift, Wheel Out, Black Widow, Red Congo, and Cuddly Bear: these are euphemisms for fraud and manipulation and our amendment would cover them all.

It is not clear to me why energy derivatives are not regulated while the Federal Government oversees some physical energy transactions. In other words, if I buy natural gas, and it is delivered to me, then that transaction is overseen by FERC, which has the authority to ensure that this transaction is both transparent and reasonably priced.

But a giant loophole is opened where there is no Government oversight, when transactions are carried out in electronic exchanges. As a result, if I sell natural gas to you, and you sell it to someone else who sells it to another person who then sells it again, none of these transactions are covered by FERC or the CFTC. Because of that, what we saw in the western energy crisis is that this particular loophole allowed energy companies to manipulate prices and to escape any investigation or prosecution by any regulatory agency.

Our amendment will close the loophole, as Senator LEVIN said, created in 2000 when Congress passed the Commodities Futures Modernization Act.

The loophole exempted energy trading from regulatory oversight, and it excluded it completely if the trade was done electronically. At the time, Enron was the main force behind getting this exemption in this act. By closing this loophole, the amendment will prohibit fraud and price manipulation in all over-the-counter energy commodity transactions and provide the CFTC the authority it needs to investigate and prosecute allegations of fraud and manipulation.

Opponents of this amendment have questioned why we need to explicitly give the CFTC this authority. The answer is we need to give the Commodities Futures Trading Commission this authority because we learned during the western energy crisis that there was, in fact, pervasive manipulation and fraud in energy markets, and that FERC and the CFTC were either unable or unwilling to use the authority they

had to intervene. I think Mr. Delaney's plea bargain is eloquent testimony to that.

We need to give the CFTC this authority because we need regulators to protect consumers and make sure they are not taken advantage of. We need to give the CFTC this authority because, when there are inadequate regulations, consumers are ripped off. Let me be clear. Our amendment will provide the same protections to consumers in energy markets as these same consumers have in all other commodity markets such as the New York Merchantile Exchange or the Chicago Merchantile Exchange. Our amendment does not provide more regulation or greater oversight than what currently exists for other commodity markets, merely the same protections: Protections which are currently lacking.

In fact, in an effort to avoid onerous or complicated requirements, Senator LEVIN, Senator LUGAR, and I have worked together to make sure the recordkeeping and reporting requirements are very clear. Our amendment only requires traders to keep records of over-the-counter trades in energy commodities and derivatives that perform a significant price discovery function. In other words, these are the trades that affect the pricing for everyone. These are the big trades, and these are the trades where there needs to be transparency because they affect the market.

If I am a large company and I sell you 1,000 decatherms of natural gas in a typical transaction on the spot market, this is a price discovery transaction because the prices of these transactions are usually covered and reported by the press and will affect prices of subsequent transactions. Trades on electronic markets serve, by their very nature, as price discovery functions. They should be available for everyone to see because they will very likely influence what price the next trader will buy or sell at in an open and transparent fashion.

Our amendment would require traders to keep records of their trades and to maintain an audit trail. This requirement would simply regulate energy trading in the same way other finite commodities are handled. Why should pork bellies or frozen concentrated orange juice have more protection for consumers than electricity?

There is nothing in this amendment that should be burdensome for traders in any way. I would think responsible traders would already be keeping records and maintaining an audit trail for their own protection in this world. In fact, the amendment only allows the CFTC to seek information to investigate allegations of wrongdoing.

We have worked for almost 3 years to craft this provision. It has had hearings in the committee. It has been discussed on the floor. We have met with dozens of people. We understand there are those who do not want to support it. But in not supporting it, what they are doing is condoning a marketplace that has practiced deep fraud and deep manipulation and for the most part gotten away with it.

I don't think we do our job as Senators if we can't protect an unsuspecting public. As the Derivative Center pointed out, these markets are in disarray now. Why are these markets in disarray? They are in disarray because people do not have confidence in them. They are in disarray because there is no transparency because there are hidden markets, and when they explode, they explode big time.

Why should Mrs. Smith from Texas or Mr. Jones from Pennsylvania or Mr. CORNYN from Texas invest in these markets? Why should he? He wouldn't have confidence in them. He would have no transparency. He would have no ability to know what is going on.

What we are trying to do is put that confidence back in the marketplace by providing some prudent, commonsense, antifraud, antimanipulation oversight by saying: If you trade this way, you must keep a record of the trade. You must keep an audit trail. And these trades must be transparent so that the Smiths, the Jones, and the Cornyns, if they so desire, can find out what in fact is going on.

Let me stress that this does not impact financial derivatives in any way whatsoever. We have clarified that. Our opponents persist in using the argument that financial derivatives are affected. They are not. Look at page 20, lines 17 to 20, if you want to see it in black and white. Nothing in this provision affects the authority of the Federal Energy Regulatory Commission. We don't change it in any way.

To respond to concerns about trading platforms that only match buyers and sellers, there is no capital requirement. Let me repeat that because people are going around saying there is. To respond to concerns about trading platforms that only match buyers and sellers, there is no capital requirement.

Bottom line: Our amendment merely gives back to the CFTC most of the authority it had before Congress passed the Commodity Futures Exchange Act.

I note that Senator LEVIN is in the Chamber. I wonder if it would be appropriate for him, if other Members would agree, to make some comments at this time.

Mr. BENNETT. Mr. President, I would have no objection to having the Senator from Michigan make his statement. But I wonder if we can arrive at some kind of time agreement as to how much longer we are going to spend on this amendment. I was told the Senator from California originally said she could deal with it in an hour and a half. I suggested an hour and was told that was not acceptable. I am now willing to say an hour and a half if we can, in fact, nail that time down, with the Senator's statement until now applying against the full hour and a half.

Mrs. FEINSTEIN. If I might respond, I believe Senator LEVIN will speak, Senator LUGAR wishes to speak, and Senator CANTWELL wishes to speak. So on our side of this issue, I believe it will be at least an hour and a half.

Mr. BENNETT. An additional hour and a half, I ask?

Mrs. FEINSTEIN. It may not be. I will try to move it rapidly along. These Senators have indicated they wish to come to the floor.

Mr. BENNETT. I ask unanimous consent, then, that the debate on the minority side be limited to an hour and a half from this point forward, and I will control the time on the majority side and see that we have no more than an hour and a half to respond.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

Mr. BENNETT. In that case, I have no objection to the Senator from Michigan speaking now.

The PRESIDING OFFICER. The Senator from Michigan is recognized.

Mr. LEVIN. Mr. President, first let me thank Senator FEINSTEIN for her leadership on this issue and for her typical courtesy in interrupting her statement so I may give mine at this time. It is most appreciated. More important, I thank her for her leadership and Senator LUGAR's leadership in bringing this amendment to the floor.

Recent highly negative events in our energy markets show that there is an urgent need to prevent price manipulation in those markets, improve the transparency of energy markets, and to strengthen the ability of State and Federal agencies to enforce the rules governing the operation of those markets.

Widespread price manipulation and falsification of price information in the electricity and natural gas markets in the last few years have inflicted billions of dollars in extra costs on energy consumers and businesses and have been a severe blow to our economy.

The corruption and manipulation of these markets by Enron and other companies fueled the collapse of some energy markets in the United States, the bankruptcy of some energy companies, and a huge decline in investment and trading in the energy markets.

The bipartisan amendment of Senators FEINSTEIN, LUGAR, myself, and others would close these ''Enron loopholes.'' Enron used these loopholes, and other companies joined with them, to manipulate energy markets at the public's expense. Our amendment would strengthen prohibitions on fraud and manipulation and give both the Federal Energy Regulatory Commission, FERC, and the Commodity Futures Trading Commission, CFTC, the necessary tools to monitor the energy markets, to prevent manipulation, and ensure that prices are fairly and competitively arrived at.

This legislation is needed because companies such as Enron are now permitted to trade large amounts of energy in virtually unregulated markets, making those unregulated markets and

the resulting price of the energy we use vulnerable to fraud and manipulation.

FERC's recent report on manipulation in the western energy market provides some stunning examples of how the energy markets can be manipulated.

FERC found that Enron, through an unregulated electronics trading center called EnronOnline, ''manipulated the price of physical gas upward and downward,'' earning huge amounts of illegal profits. FERC determined that Enron often ''invited counterparties to wash trades, and these trades created a false sense of liquidity, which can distort prices. Enron also manipulated prices on the EOL by having affiliates on both sides of certain wash-like trades. This created artificial price volatility and raised prices.''

The report by FERC concluded that ''large-volume, rapid-fire trading by [Enron] . . . substantially increased natural gas prices in California.'' FERC found ''significant market manipulation'' in the ''inextricably linked'' natural gas and electricity markets, and that ''dysfunctions in each fed off one another'' during the energy crisis in California.

According to FERC:

Spot gas prices rose to extraordinary levels, facilitating the unprecedented price increase in the electricity market. Dysfunctions in the natural gas market appeared to stem, at least in part, from efforts to manipulate price indices compiled by trade publications. Reporting of false data and wash trading are examples of efforts to manipulate published price indices.

Finally, the report found:

The widespread false reporting led staff to conclude that reported prices did not reliably reflect market activity.

I would like to give one specific example on how one day, January 31, 2002, Enron used an unregulated, nontransparent Internet trading system to manipulate the natural gas market in California.

In August of 2002, the FERC staff issued an investigatory report finding that out of a total of 227 trades on that day, January 31, 2002, 174, or more than two-thirds of the trades on that day, involved Enron and a single unnamed party. Most of these trades took place during the last hour of trading with two parties buying huge amounts of natural gas from each other in numerous transactions.

FERC determined that the trades took place at ''higher prices,'' in their words, than other trades that day, and resulted in a steep price increase over the last hour of trading. FERC described this trading activity as ''difficult to rationalize as a normal or standard business practice'' and noted:

[O]nly Enron and possibly the counter party could have known that so much of the trading was going on between themselves, because parties looking at EOL's screens could only see the bid and ask prices; they could not know who the counter party was on any particular trade.

The FERC report indicated that EnronOnline's prices were routinely used to prepare published reports on natural gas prices, which meant that the Enron price data was not just affecting Enron trades but also causing higher natural gas prices industrywide. The report concluded that Enron had ''significant ability and incentive to manipulate the price data published by the reporting firms.''

This spring, FERC issued a number of recommendations to fix the problems in the energy markets. FERC recommended new policies and procedures for the oversight of commodity trades and prices and a system of market surveillance to detect and prevent manipulation.

In March of this year, following a year-long investigation, I released a Permanent Subcommittee on Investigations staff report into the operation of crude oil markets. The report describes the regulated and unregulated markets for buying and selling crude oil and explains how crude oil prices are set and how they affect the price of critical oil commodities, such as gasoline, home heating fuel, jet fuel, and diesel fuel.

The report describes the vulnerability of unregulated commodity markets to price manipulation and the need for and beneficial effects of U.S. commodity regulation. The report also explains how the over-the-counter markets are virtually unregulated and, therefore, vulnerable to manipulation.

The report recommends that traders in over-the-counter markets be required to ''provide the CFTC with routine information on large positions in crude oil and energy contracts and derivatives, as well as other information that would aid the CFTC in detecting, preventing, and halting commodity market manipulation.''

So we have two reports reaching the same conclusions about the need for more market transparency and strengthened oversight to detect and prevent fraud and manipulation in energy markets.

How did we get to this position where companies, such as Enron, are permitted to manipulate prices in our energy markets? The answer lies in how the energy markets and the Federal regulations have evolved over the last 20 years.

Billions of dollars' worth of contracts for the future delivery of energy are now traded every day. These contracts are called energy derivatives because they derive their price from the price of the energy commodity in the contract.

There are two basic types of energy derivatives. Energy derivatives that are traded on futures exchanges are called futures contracts. The trading of futures contracts on futures exchanges is regulated by the Commodity Futures Trading Commission under the Commodity Exchange Act.

The other type of energy derivatives, which are not traded on futures exchanges, are called over-the-counter energy derivatives. These derivatives may be traded by fax, by phone, in face-to-face meetings, or over the Internet. The trading of these derivatives is virtually unregulated.

Both the futures markets and the over-the-counter markets perform identical economic functions. Both markets enable traders to buy and sell commodities at fixed prices, disseminate information about commodity prices, and provide a way for buyers and sellers to hedge against changes in the price of these commodities. Commodity traders routinely use both the futures markets and the over-the-counter markets for price discovery and hedging.

Today, the types of contracts traded in the futures markets and the over-the-counter markets are virtually identical. As an indication of how indistinguishable these contracts really are, the NYMEX even calls some of the contracts that it offers on its over-the-counter electronic market ''futures contracts.''

This is an example of what is shown on the NYMEX boards. This is the way the NYMEX advertises: Light Louisiana sweet crude oil futures—futures. Futures are supposed to be bought and sold on futures markets, not over-the-counter markets, but this is an over-the-counter sale and offer.

This is a picture the New York Mercantile projects over the Internet for the purchase and sale of over-the-counter contracts. Notice it says: Trading venue is over the counter, and yet it calls that over-the-counter offer ''futures.'' If they were really futures, they would be regulated as futures contracts are by the Commodity Futures Trading Commission. But these are over-the-counter sales. These are unregulated, and yet they are characterized as futures. The language used here is interchangeable. The economic function is interchangeable. The only difference—and it is a critical difference—is that futures contracts are regulated by the Commission and over-the-counter contracts are not. And they should be. They perform the same economic function. The language used is exactly the same and yet there is one group of contracts unregulated. The other group of contracts is regulated. It is the unregulated contracts which got us into so much trouble, the lack of transparency which got us into so much trouble.

Let me give another example. The largest over-the-counter electronic trading facility is the IntercontinentalExchange, known as ICE, in Atlanta. It trades contracts that it calls futures, and yet these are not futures; these are over-the-counter transactions, described by the ICE as futures. It says you can trade futures from your desktop. Yet these are over-the-counter transactions.

Here is what they say on their Web site:

IntercontinentalExchange brings parallel trading in IPE Brent crude of futures to the ICE platform. Electronic futures trading sessions operate in parallel with the regular

open-outcry session on the IPE floor in London.

Now, that open-outcry session, as they phrase it, is the futures trading session that occurs at the exchanges. So they are treating them the same. They are saying, one can trade in futures electronically. The language now has become the same, the economic function is the same, but there is one key difference, and it is a deadly difference in terms of consumers and in terms of manipulation of prices. That difference is that futures contracts are in fact regulated and must be disclosed and are in fact transparent, whereas the over-the-counter trades are not. They are now dealt with interchangeably by the largest exchange, the largest over-the-counter electronic trading facility in the country, the IntercontinentalExchange in Atlanta.

Only real futures markets are regulated to prevent price manipulation. That is a fact. The over-the-counter market is not. That is what has got us in the hole we are in. That is what permitted Enron to dig us deeper into the hole we are in and to cause the loss of huge amounts of money to our consumers and to many customers. No disclosure, take care of these trades over the market. If the market were a regulated market, such as the futures market is, it would have been regulated. It could have been transparent. We would not have seen the Enron disaster and the manipulation that we saw in Enron and by other companies.

The Commodity Exchange Act regulates the futures exchanges so that they cannot be artificially manipulated. This regulation and transparency has bolstered the confidence of traders in the integrity of these markets and it has helped to propel our country into the leading marketplace for many commodities.

For example, the New York Mercantile Exchange, NYMEX, is the world's leading exchange for futures contracts, for energy products such as natural gas, crude oil, gasoline, and home heating oil. The CEA makes it a felony to manipulate the price of any commodity, and it contains a number of provisions to enable the futures exchanges and the CFTC to detect and prevent price manipulation. The CEA requires the regulated futures exchanges to ensure that trading is orderly and to detect and prevent price manipulation. The CEA directs the CFTC to oversee the operations of the futures exchanges and to itself perform market oversight and ensure that trading is orderly.

According to a former CFTC Chairman:

> The job of preventing price distortion is performed today by regulatory and self-regulatory rules operating before the fact and by threats of private lawsuits and disciplinary proceedings after the fact. Both elements are essential.

According to the CFTC:

> The heart of the commission's direct market surveillance is a large-trader reporting system, under which [the futures exchanges and brokers] electronically file daily reports with the commission. These reports contain the futures and option positions of traders that hold positions above specific reporting levels set by the CFTC regulations.

There are no protections against manipulation in the over-the-counter markets. Unlike the futures markets, the over-the-counter markets are not required to monitor trading to detect and deter fraud and price manipulation. Information that is routinely reported to the futures exchanges and the CFTC is not available to the over-the-counter exchanges or to the CFTC. Traders do not have to report large trades. There are no position limits or daily price limits. The over-the-counter markets lack all of the critical features of an effective program to detect and prevent price manipulation.

Over-the-counter energy derivatives are unregulated because of a provision that was added to a conference report at the last minute in an amendment to the Commodity Exchange Act in an omnibus appropriations bill at the end of the Congress in the year 2000. The Commodity Futures Modernization Act of 2000 was intended to clarify the regulation of financial instruments. Most of the provisions in the CFMA were based upon the recommendations contained in the Report of the President's Working Group on Financial Markets, Over-the-Counter Derivatives Markets and the Commodity Exchange Act, which was jointly issued in November 1999 by the Treasury Department, the Federal Reserve, the SEC, and the CFTC.

The working group recommended that financial derivatives be excluded from regulation under the CEA but that derivatives involving nonfinancial commodities with a limited supply, such as energy commodities, not be excluded.

The working group stated:

> Due to the characteristics of markets for nonfinancial commodities with finite supplies, however, the working group is unanimously recommending that the exclusion not be extended to agreements involving such commodities.

A unanimous recommendation of the working group and the House and Senate bills leading up to that conference in fact did not extend the exclusion to commodities transactions. Yet the exemption in the current law for trades in over-the-counter energy derivatives, the Enron exemption, somehow or another got inserted in that law at the eleventh hour during a House-Senate conference. This exemption was never considered by any committee. It was never discussed at any hearing. It was never commented on by interested parties. It was simply inserted in the conference report at the last minute. It is one of the reasons for the Enron mess that we have had to clean up after.

This amendment would correct that situation. It is essential we have this kind of transparency regulation in the commodities markets. I hope this amendment, which is a bipartisan amendment, will be adopted by this body and close the Enron loophole which was created in the dark of night, without any debate in this body, without any knowledge of this body, in a bill which this body had passed without such an exemption, in a bill which the House had passed without such an exemption, and yet the exemption showed up nonetheless in a conference report and helped to create the Enron disaster and mess which we have been trying to clean up ever since.

Exempting energy commodity trades from the CEA did not make sense when it happened in 2000. It would be irresponsible to continue it now, especially after we have seen how it facilitated the market fraud and manipulation by Enron and others.

The amendment before us would return the commodities law to the way it was for decades prior to the passage of the Enron exemption. It would ensure that fraud and price manipulation would be a felony, and it would remove ''the Enron exemption'' as a shield against regulation and prosecution. It would authorize the CFTC to establish recordkeeping requirements to enforce the anti-fraud and anti-manipulation prohibitions in the CEA.

This amendment also contains important provisions to improve FERC's ability to ensure the transparency and integrity of wholesale energy prices. It would direct FERC to establish an electronic price reporting system, strengthen the penalties for violations of the Federal Power Act and the Natural Gas Act, prohibit wash trading and other collusive and manipulative practices in wholesale energy markets, and clarify FERC's authority to fashion appropriate remedies in cases of wholesale price manipulation.

There is a great deal of support for this legislation.

Governor Jennifer Granholm, of my home State of Michigan, writes that, in the aftermath of the massive electricity blackouts that struck Michigan and large areas of the midwest and northwest this past summer, ''all necessary steps should be taken to bolster business and consumer confidence in the Nation's energy markets and promote additional investment in reliable energy delivery at a fair price.'' Governor Granholm says our language ''would improve energy price transparency in wholesale electricity markets, greatly increase criminal and civil penalties for trading violations, prohibit market manipulation and fraud in all energy market sectors, and strengthen day-to-day energy market oversight, including over-the-counter market transactions that significantly affect energy prices.''

The American Public Gas Association supports the amendment because ''it will improve market transparency and provide the essential regulatory oversight to detect and prevent manipulation and improve the efficiency of energy markets.''

Attorney General Eliot Spitzer, from the State of New York, urges swift

adoption of the amendment, writing that ''the amendment closes loopholes used to manipulate energy markets, improves the ability to detect fraud and other manipulation, and deters manipulation by establishing substantive penalties.''

The North American Securities Administrators Association, the association representing the securities administrators of the 50 States, supports this amendment because it ''would provide more transparency to the wholesale electricity markets, supply the CFTC with the authority to detect fraud and manipulation, and help to deter wrongdoing by significantly increasing the penalties for violations of the Federal Power Act.''

Consumers Union, the Consumer Federation of America, Public Citizen, and the U.S. Public Interest Research Group support this amendment. They state it ''would go a long way towards addressing the serious problems plaguing the Nation's energy markets.''

The Derivatives Study Center comments that ''this important legislation will assure that [energy commodities] will be covered by Federal prohibitions or fraud and manipulation. . . . It will subject [energy] derivatives to some of the same regulations that apply to securities, banking, exchange-traded futures and options and other sectors of U.S. financial markets.''

The National Association of State Utility Consumer Advocates writes that this legislation ''will help fix broken energy markets and given regulators the tools needed to protect consumers from market manipulators.''

One hundred and fifty years of history of our commodity markets demonstrates that market integrity and investor confidence will not magically spring up in markets that have been tainted by manipulation. That same history shows that fair and efficient markets do not emerge by themselves. Rather, regulation and oversight are necessary to ensure that markets are fair and efficient. Without fair and efficient, and that means transparent, energy markets consumers will pay higher prices for energy products, capital will be misallocated, and out national economy and energy security will be harmed.

This history also shows that a legal prohibition against commodity market manipulation, without more, does not deter or prevent manipulation. Continuous market disclosure and oversight are essential to halt manipulation before economic damage is inflicted upon the market and the public. This is why a major portion of the CFTC's budget and resources is devoted to oversight of the futures markets.

Although some enforcement actions have been brought following the manipulation of the western markets, these enforcement actions will do little to make whole the consumers and businesses that suffered billions of dollars in losses from those misdeeds. It would be far better to ensure that such abuses do not occur in the first place, rather than rely on the hope that a few of the manipulators are caught after the fact.

We cannot afford to have more Enrons, more manipulations, more frauds, and more flight of capital in the energy sector. It is imperative that we restore the integrity and credibility of our energy markets.

Our bipartisan amendment will help create fair and transparent energy markets that investors can trust.

Mr. President, I thank the Senator from California for her tenacity on this and so many other issues. But in this matter she and her State have suffered firsthand probably more than any other State as a result of this Enron loophole which she is so heroically and determinedly trying to close this afternoon.

Mrs. FEINSTEIN. I thank the Senator from Michigan. More than just thank him, I thank him for his brilliance and for his willingness to be part of this effort. I think Senator LEVIN is really one of the fine minds in this Senate. It has been a great delight for me to have the opportunity to work with him. I think he has helped us make this a much better bill. I thank him so much.

Mr. President, at this point I would like to read into the RECORD a colloquy between the two leaders, Senators FRIST and DASCHLE, which makes clear the parameters of this and why we are on the floor on this bill. If I may:

Senator DASCHLE: Mr. President, Senator FEINSTEIN has a market manipulation amendment that she was seeking a vote on. It is my understanding that the agricultural appropriations bill would be the appropriate bill for that amendment. I would inquire of the majority leader, should she offer her amendment to that bill, would she be assured of a vote on or in relation to her amendment with no second-degree amendments, prior to such vote?

The majority leader responds:

The Democratic leader is correct. If Senator FEINSTEIN offers her amendment to that bill, she will get a vote on or in relation to it.

I just offer that to clarify the present legal situation.

The PRESIDING OFFICER. The Senator from Indiana.

Mr. LUGAR. Mr. President, I thank the distinguished Senator. I compliment her and I compliment Senator LEVIN on this work. I am pleased to be associated with them in this amendment.

I come to this amendment from an experience serving on the Agriculture Committee throughout the 27 years of my service in the Senate and 6 years as chairman of the committee. The Agriculture Committee spent a great deal of productive time working with the CFTC to make certain that the regulatory aspects with regard to trading were as strong and as just as possible. We did so, not in a sense of being punitive with regard to new markets and new innovations to weigh in on how American enterprise might flourish, but rather to try to give confidence to hundreds of thousands of traders and beyond—the farming community in particular—of our country. That was the basis for the creation of the Commodity Futures Trading Commission. We have had renewals of the CFTC during my tenure, and I believe we have improved upon the situation on each occasion.

Historically, energy has been exempted from CFTC regulations. I will not attempt to trace the history of why those exemptions occurred. But I will say, in the give and take of compromise as the legislation made its way through the committees of the House and the Senate, and conferences in consultation with the White House, on each occasion in which energy was about to be incorporated in a regulatory pattern, it was exempted as a final compromise in order to gain passage of legislation at one juncture or another. That turned out to be a fatal flaw.

The testimony before the Agriculture Committee, quite apart from testimony before other committees represented by the Senators here today, indicated it was not the entirety of the problem but certainly an example of the contribution of a very grave set of circumstances in which traders without particular scruples and with a minimum of regulation bankrupted each other, and unfortunately, a good number of other innocent parties in the process.

Even in the midst of all of this rubble, as we witnessed the whole thing collapsing, there were still brave spirits in committee and elsewhere who said: ''Let freedom rein; don't regulate anything that doesn't need regulating.'' But, of course, by that time, most of the market aspects of it—all the electronic aspects of it—the poles and the plugs, had literally been pulled.

I do not claim to understand the entirety of the complexities of how those markets work. At some point, if there are not people who can make good trades, you literally pull the plug and stop your electronic mechanism and the trading stops, and those who are still on the merry-go-round are out of luck.

There has always been the arguments that this is simply a subject for a few wealthy Americans to consider as they deal with each other. But that is not the case. The principal users of these markets are very wealthy people—people who ought to know better and who have proper legal or financial counsel so they don't make mistakes.

But there are other people who get involved. The ramifications of the energy markets are not just for private corporations but they branch out into services for communities and the governing systems of this country.

I appreciate very much those who will continue to advocate in the midst of all of the devastation which is apparent—and books are now being written about the difficulties. These books

will point out, as some already have, that the President's working group—whose members testified before the Agriculture Committee several times when I was chairman—let the markets go without regulation; and said if you have not regulated at this point, let them alone. I am here to advise the President and the member of this working group, that these markets do not work well without public confidence, and without a degree of transparency. If there is anything occurring in American financial markets now, anything encouraging to investors, it is the thought that finally many people in Government have come to their senses and realized a good number of things have been going on to undermine confidence in those markets. Those of conservative persuasion who favor the markets and believe markets work, have to take responsibility and make certain they do actually work. In order for them to work, markets must be just, and investors must understand that there are remedies, as opposed to pulling the plug, literally, and letting the trades flounder and bankruptcy ensue.

Mr. President, this is a very serious problem. I appreciate very much the persistence of the Senator from California in insisting that this issue needed to be raised again. She has raised it, and this is why I have come to the floor today in support of it.

I recognize the atmosphere in which we are involved in trying to come to grips with the Agriculture appropriation in such a short time frame. It is a necessity to complete our work.

This is not, perhaps, the most conducive manner to study this complex subject matter that Senators might require. However, I simply say, during my chairmanship, the Agriculture Committee studied this issue to a fault. Beyond circumstances I can control, I was no longer chairman, and the issue slid from the agenda. I do recall that we researched the issue, brought all the parties together, and held 2 days of study with experts on how future markets work. Many Members came to the conclusion that energy should be included, and it should be reformed. I pray that will occur.

The CFTC, I believe, is the logical repository, but I am not insistent upon that. The need for reform is at hand and this amendment advances that ball.

I yield the floor.

The PRESIDING OFFICER (Mr. HAGEL). The Senator from California.

Mrs. FEINSTEIN. Mr. President, I thank the Senator from Indiana. He has taken a position based on extraordinary knowledge, having served on that committee for 27 years, having been its chair, having seen what happened with the Commodity Futures Oversight Act.

In resisting, as he termed it, the movement just to have anything go, let anything go, if they are not regulated, let it go that way, he realizes the American people are not well served and the investment community is not well served when every day you pick up a newspaper and someone else is being arrested for fraud or manipulation. Our laws can prevent that from happening.

I thank the Senator very much. You have been terrific. Your support is very meaningful to us.

I have stated in the Senate numerous times it is the duty of this Congress to make sure our regulators have all the authority they need to prevent fraud and manipulation in the energy markets. Simply put, this is what our amendment does.

Enron remains the perfect example of how the systems were so easily gamed. After Enron successfully lobbied for an exemption to the Commodity Futures Modernization Act in 2000, they and others in the energy sector quickly took advantage of this new freedom by trading energy derivatives absent any transparency and regulatory oversight. In other words, in secret. Thus, after the 2000 legislation was enacted, Enron began to trade energy derivatives literally without being subject to proper regulatory oversight. That is how all these schemes came about. Some hotshot trader, sitting in front of his computer, found a way to evolve a strategy for the fraudulent and manipulative action of the marketplace. They let these various strategies play out.

Unlike the NASDAQ, from which timely electronic trade reports are available to the public, even prior to its transparency-enhanced reforms in 1997—in 1997, the NASDAQ reformed itself to make their traders more transparent—EnronOnline did not offer timely reporting of executions. This means EnronOnline provided no data regarding recently executed transactions. Consequently, even after the trades, basic market information was not provided to market participants.

It should not surprise anyone that without basic transparency, without the ability to see what is happening, prices would soar. What interests me is they did and yet there is still resistance to this legislation.

In 2 years, Enron's derivatives business had been a stand-alone company. It would have been the 256th largest company in America. That year, according to author Robert Bryce, Enron claimed it made more money from its derivatives business, $7.23 billion, than Tyson made from selling chickens. That is huge, if you think about it. Think what that means. This segment of the market in one year made $7 billion and nobody knew how. No one knew what the trades were. They were all in secret. Nothing was registered. There was no audit trail. There was no antifraud, antimanipulation oversight. Boom. It happened.

EnronOnline rapidly became the biggest platform for electronic energy trading. But unlike the regulated exchanges, such as the New York Mercantile Exchange, the Chicago Mercantile Exchange, and the Chicago Board of Trade, EnronOnline was not registered with the CFTC. So Enron set its own standards. In other words, it had a very secure, quiet, protected niche on the market.

Others have tried to replicate that. The banks, for example, Senator LEVIN said, devised something called the IntercontinentalExchange so they could do the same thing Enron has done. It is wrong.

Traders and others in the energy sector came to rely on EnronOnline for pricing information. Yet the company's control over this information and its ability to manipulate it was tremendous. As author Robert Bryce went on to describe—and this is very colorful and true—Enron did not just own the casino. On any given deal, Enron could be the house, the dealer, the oddsmaker, and the guy across the table you are trying to beat in diesel fuel futures, gas futures, or the California electricity market. You tell me that is a good situation?

You tell me this Senate and this Congress should let that happen. We should not. That is just plain wrong. Those who want to protect this secret niche are just dead wrong. It is not in the American people's interest to have a secret trading niche that can be an empire for fraud and manipulation. We need to protect consumers from future Enron-like scams because they are going to happen.

Now, was Enron and its energy derivative trading arm, Enron Online, the sole reason California and the West had an energy crisis? Absolutely not. Was it a continuing factor to the crisis? I certainly believe that evidence has shown it was.

Unfortunately, because of the energy exemptions in the 2000 Commodity Futures Modernization Act, which took away the CFTC's authority to investigate, we may never know for sure. In other words, quite purposely, this Congress, in 2000, let this secret world be created and said: We are going to take energy and metals out of the entire trading regulatory structure and we are going to let them go ''on operating'' on their own, without the proper oversight. That is exactly what happened. It is just plain wrong.

I repeat, once again, the amendment we offer will subject electronic exchanges such as EnronOnline to the same oversight as other commodity exchanges, such as the Chicago Mercantile Exchange, the New York Mercantile Exchange, and the Chicago Board of Trade—no more, no less. Without this type of legislation, there is insufficient authority to investigate and prevent fraud and price manipulations since parties making the trade are not required to keep a record.

This amendment is not going to do anything to change what happened in California and the West. That is done. But it does provide the necessary authority for the CFTC to protect other parts of this country against this kind of thing happening again. And it well could happen.

Nobody thought we would ever see the kind of event that blacked out most of the east coast and the Midwest, but we did. Nobody thought we would ever see what happened in the West, but we did. Nobody ever thought anybody would come up with schemes like ''Ricochet,'' ''Death Star,'' ''Get Shorty,'' ''Fat Boy,'' but they did. Nobody thought they could use them to commit a manipulation of the market, but they did.

I will leave you with one fact: The total cost of electricity in California in 2000 was $7 billion. The cost the next year was $28 billion. Does anyone believe that market forces—namely, supply and demand—could account for a 400-percent increase in the cost of electricity in a year? The answer has to be no. The answer has to be that bad things were done.

So we have worked on this amendment. I sit on the Energy Committee. I have tried to pay a great deal of attention to these matters, to follow this, and I am absolutely convinced that America and the business climate of America is much better off when things are transparent, when there are records kept, when there is a regulatory authority that can say: Whoa. Something may be going haywire. Let's take a look at it. That is all we do—no more and no less than for any commodity.

I wish to say one other thing. A financial derivative is not like an energy derivative. For people to confuse this and say it affects financial derivatives is not right. Energy is a finite commodity. There is a beginning and there is an end, and it is different from a financial derivative.

Mr. President, may I ask how much time our side has remaining?

The PRESIDING OFFICER. The Senator from California has 32 minutes remaining.

Mrs. FEINSTEIN. Thank you. I retain the remainder of my time.

I yield the floor.

The PRESIDING OFFICER. The Senator from Utah.

Mr. BENNETT. Mr. President, I yield half an hour to the Senator from Idaho.

Just a moment, Mr. President. I was unaware that the Senator from Mississippi was on the floor. He was hiding behind me. So I yield 15 minutes to the Senator from Mississippi.

The PRESIDING OFFICER. The Senator from Mississippi is recognized.

Mr. COCHRAN. Mr. President, thank you very much. I thank the chairman very much for yielding me this time.

Mr. President, the Feinstein amendment suggests a significant change in the regulatory regime that exists today for energy markets.

My understanding of the Senator's amendment is that it would, for the first time, require regulation of off-exchange energy derivatives. These complex instruments, used to transfer risk among sophisticated traders, are vital tools in today's energy trading environment.

The Commodity Futures Trading Commission exempted off-exchange energy derivatives from regulation in 1993. The Congress codified this exemption, largely without change, as part of the Commodity Futures Modernization Act of 2000. The Congress considered regulating off-exchange energy derivatives when it debated the modernization act but chose not to do so because of the disruption new burdensome regulation would cause to these sophisticated traders.

Senators should remember that the distinguished Senator from California initially offered an amendment similar to the one before us today during last year's Senate debate on the Energy bill. On April 10, 2002, the Senate voted 48 to 50 not to invoke cloture on this initial version of the Feinstein amendment. Senator FEINSTEIN tried again with a new version of her amendment in June of this year, again during debate on the Energy bill. On June 11, 2003, the Senate tabled this amendment by a vote of 55 to 44. It should be noted that the second version of her amendment received four fewer votes than the first version. Now we have before us a third version of the Feinstein amendment.

Senators may remember from the debate last summer on the second version of the Feinstein amendment that I read into the RECORD a June 11, 2003, letter from the President's Working Group on Financial Markets. In that letter, Alan Greenspan, Chairman of the Federal Reserve; John Snow, Secretary of the Treasury; William Donaldson, Chairman of the Securities and Exchange Commission; and James Newsome, Chairman of the Commodity Futures Trading Commission, all expressed opposition to the Feinstein amendment.

The letter warned that the Feinstein amendment would have significant unintended consequences for this important risk management market. It also pointed out that the Commodity Futures Trading Commission has brought formal legal actions against Enron, Dynegy, and El Paso for market manipulation, wash—or round-trip—trades, false reporting of prices, and operation of illegal markets.

The Securities and Exchange Commission, the Federal Energy Regulatory Commission, and the Department of Justice have also initiated formal actions in the energy sector. Some of these actions have already resulted in substantial monetary penalties and other sanctions and make clear that wrongdoers in the energy markets are fully subject to the existing enforcement authority of Federal regulators.

To my knowledge, the President's working group has not changed its position on this latest version of the proposal of the Senator from California.

Finally, the Feinstein amendment may create regulatory uncertainty for off-exchange energy derivatives from multiple Federal agencies. On one hand, the amendment before us requires the Commodity Futures Trading Commission to regulate off-exchange energy market derivative transactions. However, the amendment also contains a provision that appears to preserve the Federal Energy Regulatory Commission's authority in this market. At a minimum, the amendment appears to muddy the regulatory water with respect to this market.

Remember, the CFTC has antifraud authority. It has brought legal actions against Enron, El Paso, Dynergy, and others regarding energy market problems. It has recovered millions of dollars in fines from these companies. It has numerous ongoing investigations in this area. And more charges are possible. The Senator from California has said that her amendment is needed to prevent wash trades. The CFTC has wash trade authority. It has specific authority under section 4 of the CEA. The CFTC has brought several wash trade actions in the last several years, and its authority to do so has been upheld recently by two U.S. appeals courts. Just this year, the Commodity Futures Trading Commission has recovered tens of millions of dollars from merchant energy traders for wash trades and false trades.

It has also been suggested by the Senator that because exempt commercial markets such as the InterContinentalExchange are exempt from regulation under the Commodity Exchange Act that they have no regulatory oversight. These markets are subject to many regulatory requirements. They are required by statute to have an electronic audit trail. They are required by statute to keep records for 5 years. They are subject to antifraud and antimanipulation authority under the CFTC's jurisdiction. They are subject to special call examinations by the commission as well.

This amendment would impose large trader reporting on exempt commercial markets. Large trader reporting works on retail futures exchanges with standardized contracts but wouldn't work on exempt commercial markets which do not have the same type of standardization. Large trader reporting on exempt commercial markets could actually lead to misleading information being provided to the public. Large trader reporting is used for market surveillance in retail futures markets.

The Commodity Futures Trading Commission's statutory authority for exempt commercial markets is after-the-fact antifraud and antimanipulation enforcement and is, therefore, inconsistent with a large trader reporting scheme.

For these reasons, which I think are very compelling, the Senate should reject this amendment.

I ask unanimous consent to print in the RECORD the text of a letter that went out to all Senators signed by myself, Senator PETE DOMENICI, Senator MIKE CRAPO, and Senator ZELL MILLER on this subject, along with enclosures which are letters addressed to Senators CRAPO and MILLER from the Department of the Treasury, Board of Governors of the Federal Reserve System,

signed by John W. Snow, Alan Greenspan, William Donaldson, and James E. Newsome, along with a Department of the Treasury letter, dated September 18, 2002, to these same two Senators, Mr. CRAPO and Mr. MILLER.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

OPPOSE FEINSTEIN DERIVATIVES AMENDMENT TO AGRICULTURE APPROPRIATIONS BILL

DEAR COLLEAGUE: We are writing to express our opposition to the Feinstein Derivatives Amendment to the Agriculture Appropriations bill. This amendment has been defeated twice before on a motion to invoke cloture in April 2002 (48–50) and most recently on a motion to table in June 2003 (55–44).

The amendment before us today is an up or down vote. The amendment would significantly modify portions of the Commodity Futures Modernization Act of 2000 (CFMA) and re-introduce legal uncertainties into derivatives markets. It is our understanding that the amendment's goal is to provide additional regulatory oversight to the over-the-counter (OTC) energy derivatives markets in light of the California energy crisis and Enron's bankruptcy; however to date, there is no evidence that derivatives caused either crisis.

Attached please find copies of two letters from the President's Working Group. The 2002 letter discusses reasons why the derivatives amendment is not warranted and urges Congress ''to be aware of the potential unintended consequences of current legislative proposals.'' The 2003 letter discusses all the civil, criminal and enforcement actions taken by the various federal agencies against the wrongdoers in the energy markets since Enron and specifically highlights the CFTC's actions.

Finally, the Energy Policy Act of 2003 will address many of the provisions in Senator Feinstein's proposed legislation, including increased protection against fraud and manipulation, which addresses the Enron-On-Line problem, a ban on roundtrip trading, and increased penalties for violations of the Federal Power Act and Natural Gas Act. Any attempt to undermine the Energy bill by adding similar provisions to the Agriculture Appropriations legislation is unnecessary and we strongly oppose this effort.

Sincerely,

THAD COCHRAN.
MIKE CRAPO.
PETE DOMENICI.
ZELL MILLER.

Attachments.

DEPARTMENT OF THE TREASURY, BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, U.S. SECURITIES AND EXCHANGE COMMISSION, COMMODITY FUTURES TRADING COMMISSION,

June 11, 2003.

Hon. MICHAEL D. CRAPO,
U.S. Senate, Russell Senate Office Building, Washington, DC.
Hon. ZELL B. MILLER,
U.S. Senate, Dirksen Senate Office Building, Washington, DC.

DEAR SENATORS CRAPO AND MILLER: Thank you for your letter of June 10, 2003, requesting the views of the President's Working Group on Financial Markets (PWG) on proposed Senate Amendment #876 to S. 14, the pending energy bill. As this amendment is similar to a proposed amendment on which you sought the views of the PWG last year, we reassert the positions expressed in the PWG's response dated September 18, 2002, a copy of which is enclosed. The proposed amendment could have significant unintended consequences for an extremely important risk management market—serving businesses, financial institutions, and investors throughout the U.S. economy. For that reason, we believe that adoption of this amendment is ill-advised.

We would also point out that, since we wrote that letter last year, various federal agencies have initiated actions against wrongdoing in the energy markets. As you note, the CFTC has brought formal actions against Enron, Dynegy, and El Paso for market manipulation, wash (or roundtrip) trades, false reporting of prices, and operation of illegal markets. The Securities and Exchange Commission, the Federal Energy Regulatory Commission, and the Department of Justice have also initiated formal actions in the energy sector. Some of these actions have already resulted in substantial monetary penalties and other sanctions. These initial actions alone make clear that wrongdoers in the energy markets are fully subject to the existing enforcement authority of federal regulators.

The Commodity Futures Modernization Act of 2000 brought important legal certainty to the risk management marketplace. Businesses, financial institutions, and investors throughout the economy rely upon derivatives to protect themselves from market volatility triggered by unexpected economic events. This ability to manage risks makes the economy more resilient and its importance cannot be underestimated. In our judgment, the ability of private counterparty surveillance to effectively regulate these markets can be undermined by inappropriate extensions of government regulation.

Yours truly,

JOHN W. SNOW,
Secretary, Department of the Treasury.
ALAN GREENSPAN,
Chairman, Board of Governors of the Federal Reserve System.
WILLIAM H. DONALDSON,
Chairman, U.S. Securities and Exchange Commission.
JAMES E. NEWSOME,
Chairman, Commodity Futures Trading Commission.

DEPARTMENT OF THE TREASURY, BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, U.S. SECURITIES AND EXCHANGE COMMISSION, COMMODITY FUTURES TRADING COMMISSION,

September 18, 2002.

Hon. MICHAEL D. CRAPO,
U.S. Senate, Russell Senate Office Building, Washington, DC.
Hon. ZELL B. MILLER,
U.S. Senate, Dirksen Senate Office Building, Washington, DC.

DEAR SENATORS CRAPO AND MILLER: In response to your letter of September 13, we write to express our serious concerns about the legislative proposal to expand regulation of the over-the-counter (OTC) derivatives markets that has recently been proposed by Senators Harkin and Lugar.

We believe that the OTC derivatives markets in question have been a major contributor to our economy's ability to respond to the stresses and challenges of the last two years. This proposal would limit this contribution, thereby increasing the vulnerability of our economy to potential future stresses.

The proposal would subject market participants to disclosure of proprietary trading information and new capital requirements. We do not believe a public policy case exists to justify this governmental intervention. The OTC markets trade a wide variety of instruments. Many of these are idiosyncratic in nature. These customized markets generally do not serve a significant price discovery function for non-participants, nor do they permit retail investors to participate. Public disclosure of pricing data for customized OTC transactions would not improve the overall price discovery process and may lead to confusion as to the appropriate pricing for other transactions, as terms and conditions can vary by contract. The rationale for imposing capital requirements is unclear to us, and the proposal's capital requirements also could duplicate or conflict with existing regulatory capital requirements.

The trading of these instruments arbitrages away inefficiencies that exist in all financial and commodities markets. If dealers had to divulge promptly the proprietary details and pricing of these instruments, the incentive to allocate capital to developing and finding markets for these highly complex instruments would be lessened. The result would be that the inefficiencies in other markets that derivatives have arbitraged away would reappear.

It is also unclear who would benefit from the proposed disclosures and regulations other than whoever simply copied existing products and instruments for their own short-term advantage. Weakening the protection of proprietary intellectual property rights in the market arena would undercut a complex of highly innovative markets that is among this nation's most valuable assets.

While the derivatives markets may seem far removed from the interests and concerns of consumers, the efficiency gains that these markets have fostered are enormously important to consumers and to our economy. We urge Congress to protect these markets' contributions to the economy, and to be aware of the potential unintended consequences of current legislative proposals.

Yours truly,

PAUL H. O'NEILL,
Secretary, Department of the Treasury.
ALAN GREENSPAN,
Chairman, Board of Governors of the Federal Reserve System.
HARVEY L. PITT,
Chairman, U.S. Securities and Exchange Commission.
JAMES E. NEWSOME,
Chairman, Commodity Futures Trading Commission.

The PRESIDING OFFICER. The Senator from Utah.

Mr. BENNETT. I yield a half an hour to the Senator from Idaho.

The PRESIDING OFFICER. The Senator from Idaho is recognized.

Mr. CRAPO. Mr. President, I rise to address the Feinstein amendment, as the Senator from Mississippi has indicated, for the third occasion that we have debated this issue in this Congress. It is important to note that each time this amendment has been raised, it has been defeated. Each time the amendment has been raised, it has been opposed by those in the regulatory community—again as has been indicated by the Senator from Mississippi—whether it be the CFTC, the Department of the Treasury, the Board

of Governors of the Federal Reserve, or others. The fact is that consistently those who are in charge of regulating, overseeing, and managing our economy and our financial markets have been opposed to this amendment. The question that we must ask ourselves is, Why?

To do so it is important to go back over the history of this act. The Commodity Futures Modernization Act that we are debating is one with which we have had a long history of dealing in this Congress. In fact, before 2000, when President Clinton was in office, a President's working group was established which brought together experts from across the industry, not only those who were in the financial industries, but those who were regulating the financial industries, those we have already mentioned. The Secretary of the Treasury, the Commodity Futures Trading Commission, the Board of the Federal Reserve, and others were a part of this Presidential working group. Those who were involved in this Presidential working group looked at all the different commodities that we deal with, the different types of manners in which we deal with these commodities, and came up with an approach to how we should reform and modernize our law to best take advantage of the types of trading contexts or trading ideas that were utilized in the management and trading of commodities.

It is a difficult subject to talk about because it is so complicated. The bottom line is that this act was then put forward. It was brought forward on a bipartisan basis in Congress, studied extensively by congressional committees after the Presidential committee brought forward its recommendations. And in the year 2000, reforms of the act were implemented.

The amendment seeks to change the structure of regulation that this act established. The first time this challenge to the act was brought forward, we had occasion to have Mr. Greenspan before the Banking Committee. Mr. Greenspan was asked in his testimony what the proposed amendment would mean and what this concept of derivatives, that most people in America don't really get very engaged with, meant to our economy. I was the one who asked the question at that time.

Mr. Greenspan's answer is very illuminating. He said, in his opinion, increasing the regulation and changing the scheme for regulating the management and the trading in derivatives from that which had been put together by the President's working group and approved by Congress would actually increase the threat to our economy. In fact, he pointed out that a very simple way to understand derivatives is that they are a tool by which sophisticated participants in the market are able to allocate risk so that those who are better able to bear it can pick it up, and that by being an instrument or a tool through which we allocate risk in our economy, the American economy actually was able to respond more quickly, more resiliently, and more effectively to the threats that have faced it over the last few years.

Had we not had the capacity for derivatives transactions between sophisticated buyers, had that been regulated and diminished or pushed offshore because the United States chose to regulate it so aggressively, we would not have had the resilience and the response in our economy that we had.

We would have had a deeper trough and a more difficult recovery. Again, this amendment seeks to change that regulatory system Congress and the President and his working group so carefully put together.

How did that act work? Well, the act created three different categories of derivatives transactions. The first category that was fully covered and is on an exchange—regulated exchange—where the first category was the category of agricultural transactions. Those transactions are fully regulated and fully covered under the act.

The act identified certain types of transactions that should not be covered at all and should have no regulatory impact. Those were called financial derivatives. They include things such as treasury bonds, foreign exchange, or interest rates—those types of transactions that occur in the financial markets, and it was concluded they should not have any regulation. They were simply excluded from the act.

A middle category was created for all other kinds of transactions. We have, on the one hand, agricultural transactions, which are fully covered. On the other hand, we have financial transactions, which are fully excluded and, in the middle, all other types of commodities, where the energy transactions fall. It has been argued today that these energy transactions simply are not covered. In fact, the phrase that has been used is one that would imply those engaged in energy derivatives transactions simply don't have any regulatory coverage at all. The phrase ''let anything go'' has been used, or it has been said there is literally no antifraud or antimanipulation provision or protection in the law regarding these types of transactions. That simply is not the case. This middle type of transaction was not put on an exchange because these are not the kinds of transactions that general investors in the market get involved with. These are highly sophisticated transactions, detailed negotiations between very sophisticated buyers and sellers, accomplishing this result which I talked about earlier of trading and exchanging risk. It is done in such a way that it doesn't effectively work on an exchange. That is why in this middle category the exchange was not included, but regulation for price reporting, antiprice manipulation, antimarket manipulation, and antifraud protection was included. So it is simply not correct to say those engaged in energy transactions—derivatives transactions—are not subjected to antifraud, antimanipulation, or price-reporting requirements. They are, which brings to bear the question of why we need to change this system of regulation.

Again, on the floor today, as has been the case in the past each time we have debated it, the argument has been made that the Enron transaction or the Enron problem would not have been a problem had we had the aggressive kind of antifraud and antimanipulation this amendment proposes to create. Well, again, when we have had experts before us, and as has been said on the floor already by others, the Agriculture Committee and other committees have studied this very carefully. The experts have said to us there is no indication the lack of regulatory authority, if such exists, was any cause for what happened with Enron, and the lack of having regulated derivatives transactions, in terms of putting them on an exchange, or failure to have further fraud or antiprice manipulation and enforcement authority, was the cause of what happened with regard to the Enron transaction.

As a matter of fact, I asked that same question, when this issue first came up, to Alan Greenspan. He, among many others, has indicated there is no evidence the failure to have more rigorous regulatory schemes in place on derivatives transactions would have stopped Enron from doing exactly what it did.

Nobody is saying Enron did not violate the market, that Enron did not engage in price manipulation, that Enron did not engage in these wash transactions, that Enron did not engage in fraudulent behavior. The fact is, Enron did engage in these types of activities. The fact is the CFTC is currently investigating and enforcing its antifraud and antimanipulation enforcement authority against Enron and others in the market who might engage in these types of activities.

The point is, as we proceed, we must understand whether what happened in terms of the Enron circumstance was as a result of the law not being strong enough or was simply the result of the fact that Enron violated the law. The fact is Enron did violate the law, those violations are being identified, and something over $90 million in fines and penalties against Enron and other market violators have already been enforced.

Again, the point is enforcement is occurring. Why should we be concerned about adding a further regulatory scheme on top of that which is already in place? It gets back to the point Alan Greenspan made in that first hearing, where I first asked him about the issue; that is, we have a need in this country for resilience in our marketplace, in terms of allocation of risk.

Our management of derivatives is critical in terms of how well we

achieve that objective. If we want to increase the regulatory burden and increase the potential of diminishing our ability in the market to have the benefit of these very important types of transactions, then we better have a very good reason for doing so. If we want to have the benefit of a resilient marketplace, where derivatives transactions can occur between sophisticated buyers and sellers, then we want to be very careful about how we regulate it or overregulate it.

I agree with anybody who says we want to make sure there should be antiprice manipulation or antifraud provisions in place. We should have those kinds of protections in place. But we should be very careful that, as we implement this type of regulatory scheme, we don't drive offshore derivatives transactions or cause a loss of resilience in our marketplace because we overregulate these important transactions.

I note the chairman is looking to perhaps intervene here to conduct other business. I will reserve the remainder of my time.

ORDER OF PROCEDURE

Mr. BENNETT. Mr. President, I ask unanimous consent that the vote in relation to the Feinstein amendment No. 2083 occur at 2:30 today; provided that no second-degree amendments be in order to the amendment prior to the vote, with the time until then equally divided in the usual form. I further ask unanimous consent that following that vote, the Senate proceed to a vote on passage of H.R. 2622, the Fair Credit Reporting bill. I also ask as in executive session that the Senate then proceed to executive session and an immediate vote on the confirmation of calendar No. 402, Roger Titus to be U.S. District Judge for the District of Maryland; provided further, that following that vote the President be immediately notified of the Senate's action and the Senate then resume legislative session. Finally, I ask unanimous consent that there be 2 minutes equally divided for debate prior to each of the votes following the first vote.

Mr. REID. Mr. President, I wonder if my friend will modify his request to have the votes following the first vote be 10 minutes in length.

Mr. BENNETT. I am happy to have the second two votes be 10-minute votes.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

Mr. BENNETT. Mr. President, I ask the Senator from Idaho if he has further comments.

Mr. CRAPO. I do. I will need 3 or 4 or 5 minutes.

Mr. BENNETT. I yield 5 more minutes to the Senator from Idaho.

The PRESIDING OFFICER. The Senator from Idaho.

Mr. CRAPO. Mr. President, I want to conclude by once again going over the material that has already been put into the record by Senator COCHRAN from Mississippi.

As I indicated, as we have gone through this battle—now the third time—and the debate over whether we should change the manner in which we address derivatives transactions in this country, each time those who are charged with regulating and overseeing these types of concerns have weighed in in opposition to this amendment. I simply want to go through some of the points they have made from the materials. Again, they are already a part of the record.

The first time we debated this amendment, back in September, a letter was submitted by Alan Greenspan, Chairman of the Board of Governors of the Federal Reserve System, Paul O'Neill from the Department of Treasury, Mr. Harvey Pitt, Chairman of the U.S. Security and Exchange Commission, and James E. Newsome, Chairman of the CFTC.

In their letter at that time, they pointed out that this proposal would subject market participants to disclosure of proprietary trading information and new capital requirements.

The capital requirements, I understand, have been dropped in this amendment. But as they go forward, they explain they don't believe a case exists in public policy to justify this increased level of Government intervention.

The OTC markets, they state, trade a wide variety of instruments. Many of them are idiosyncratic in nature. They are customized markets and do not generally serve a significant price discovery function for nonparticipants, nor do they permit retail investors to participate.

Again, this is not a market in which general investors participate. Highly sophisticated investors engage in these transactions. There has been some debate they have actually created the market through wash transactions and other activity. My point is that type of manipulation, either through manipulating a price or through other activities, such as wash trades, is already regulatable and being addressed by the CFTC.

They go on to make the point: The trading of these instruments arbitrages away the inefficiencies that exist in all financial and commodities markets, and that we should not cause increased regulatory burdens on those important functions in our economy.

Then again in June, when we addressed this issue last, the same group responded again to the same proposal. They wanted to point out then that with regard to the argument there was all of this bad activity taking place and we needed to pass new laws to stop this bad activity, the same group of regulators—the Treasury, the Federal Reserve System, the Securities and Exchange Commission, and the CFTC—stated they have brought formal actions against Enron, Dynegy, and El Paso for market manipulation, wash or roundtrip trades, false reporting of prices, and operation of illegal markets, and these actions have already resulted in substantial monetary penalties and other sanctions.

Again, the point there is, as I made earlier, that we are enforcing the existing regime.

Lastly, if there is still concern that we don't have enough protection in the law, our current chairman of the Energy Committee, Senator PETE DOMENICI, and those who are working with him from the Agriculture Committee, and others are beefing up those protections in the current law.

A letter which, again, the Senator from Mississippi has already put in the RECORD, coming from Senator COCHRAN, myself, Senator DOMENICI, and Senator MILLER, explains that the Energy Policy Act, which we are now working through in conference, will contain increased protection against fraud and price manipulation which addresses the EnronOnline problems that have been raised by the Senator from California.

Even if the current situation in the law was not already satisfactory, we are increasing the antifraud and antimanipulation provisions to make certain that any concerns about this possibility occurring again are addressed as we focus the regulation without trying to do something to our derivatives markets that would cause a reduction in the resiliency of U.S. markets.

Mr. President, I reserve the remainder of my time.

The PRESIDING OFFICER. The Senator from Utah.

AMENDMENT NO. 2084

Mr. BENNETT. Mr. President, I send an amendment to the desk on behalf of myself and Senator KOHL and ask for its immediate consideration.

The PRESIDING OFFICER. Is there objection?

The Senator from California.

Mrs. FEINSTEIN. Is this meant to be an amendment to my amendment?

Mr. BENNETT. No, the unanimous consent agreement, I say to the Senator from California, is that no second-degree amendments are in order to her amendment.

Mrs. FEINSTEIN. Correct.

Mr. BENNETT. This is a freestanding amendment separate and apart. If the Senator from California prefers, I can wait until after the vote to offer this amendment. This is a housekeeping action.

Mrs. FEINSTEIN. Will the Senator be quick? I want to address some of the comments that have been made.

Mr. BENNETT. I will, indeed.

The PRESIDING OFFICER. Is there objection to the consideration of the amendment?

Without objection, the clerk will report.

The bill clerk read as follows:

The Senator from Utah [Mr. BENNETT], for himself and Mr. KOHL, proposes an amendment numbered 2084.

Mr. BENNETT. Mr. President, I ask unanimous consent that the reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

On page 79, between lines 7 and 8, insert the following new section:

''SEC. . Statements made by the Chairman and/or Ranking Member of the Agriculture Appropriations Subcommittee, and colloquies engaging the Chairman and/or Ranking Member of the Agriculture Appropriations Subcommittee, given on the Senate Floor or submitted for the Record during Senate consideration of this Act shall be deemed part of Senate Committee Report 108–107 for purposes of conference with the House of Representatives.''.

Mr. BENNETT. Mr. President, this amendment provides that statements made by Senator KOHL and myself, as well as colloquies we have with our colleagues during consideration of this bill would be germane for conference with the House. I urge adoption of this amendment.

The PRESIDING OFFICER. Is there further debate?

If not, the question is on agreeing to the amendment.

The amendment (No. 2084) was agreed to.

Mr. KOHL. I move to reconsider the vote.

Mr. BENNETT. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

The PRESIDING OFFICER. Who yields time?

The Senator from California.

AMENDMENT NO. 2083

Mrs. FEINSTEIN. Mr. President, I would like to try to respond to some of the comments that have been made.

I believe the CFTC has antifraud and antimanipulation oversight on futures exchanges but not on over-the-counter energy trades. That is the difference here. We would cover over-the-counter energy trades and particularly those trades that are electronic.

I also want to show where existing law is inadequate. There is a case that has just been brought to my attention which I think shows that the existing law is inadequate, and this is what we are trying to fix.

Two energy traders from the energy firms Dynegy and El Paso were charged by the U.S. Government with reporting false information on a number of trades—at least 48 trades. They falsely reported the number and the prices used in trades they conducted involving natural gas in an attempt to influence the natural gas spot price indices.

The Federal indictment charged them, among other matters, with wire fraud and violation of the Commodity Exchange Act, which is what we are talking about, provisions prohibiting price manipulation and dissemination of false information about energy commodity rates.

The Federal court allowed the wire fraud charges, but it dismissed the Commodity Exchange Act charges on the ground that the wording of the act failed to prohibit persons from knowingly providing false information. While the CEA used the word ''knowingly'' in an earlier part of the provision, the court ruled that the word had to be repeated in the section prohibiting false information.

The Feinstein-Lugar-Levin amendment would clarify the wording of the CEA provision to resolve the problem identified by this Federal district court in the case of the United States of America v. Michelle Valencia, Criminal Action No. 8–03–024.

That is a pretty clear indication of where present law is not adequate. These were bogus trades. These trades never took place. There were totally bogus, and yet the wording in the Commodity Exchange Act, which we are trying to fix, was judged by the court as too vague to take any action.

Second, I want to make this point: What we are trying to do is prevent fraud and manipulation. We are trying to prevent it and deter it from happening. The soft penalties we have now don't prevent it. That should be very clear. We toughen the penalties in the Electricity Act and in the National Gas Act. Clearly, a number of these schemes that Enron practiced, whether it was Death Star, Ricochet, or Black Widow, or any of these other terrible schemes, took place. Our bill would specifically prevent them.

We are trying to prevent and deter, and the way we do that is by strengthening the law.

I am really puzzled by the administration's position. I am really puzzled because it seems to me they should be on the side of the American people, not on the side of the traders and those who want to get rich quick from this open marketplace.

Additionally, it is interesting to me that the President's working group, when it came out in 1999, specifically said:

''Due to the characteristics of markets for nonfinancial commodities with finite supplies''—that is energy—''however, the working group is unanimously recommending that the exclusion''—the exclusion from the bill—''not be extended to agreements involving such commodities.''

So beginning in the year 2000, they have done a total switch and I do not understand why, particularly after the events of 2000 and 2001, where we know fraud and manipulation was explicit. Now when the Government tries to go after two companies for bogus trades, a court finds the Commodities Exchange Act is inadequate; it is vague.

Why would people oppose what we are trying to do? I think we are on the side of the angels.

Let me quickly go over some points. Why do we need this legislation? We need it because companies are now permitted to trade large amounts of energy in virtually unregulated markets, which makes it easier for unscrupulous companies such as Enron to manipulate the price of energy. The bill would close the Enron loophole that allows this unregulated trading.

Secondly, do we have any examples of how these markets have been manipulated? FERC recently released a 1-inch thick report on how the markets for electricity and natural gas in the western United States were manipulated in 2000 and 2001. So we know it happened. The FERC found Enron and other companies lied about the prices of their trades, reported fictitious trades to drive up prices, did wash trades with each other, and engaged in rapid trading to drive prices up and then back down, reaping millions of dollars of profits in the process and costing customers billions of dollars in unjustified energy costs. That is according to FERC. That is a finding in their study. Yet people still oppose this legislation. Unbelievable.

Would this legislation have prevented these manipulations? Under current law, the CFTC is totally in the dark about what goes on in the over-the-counter markets. Under this legislation, manipulation in these markets would be a felony and the CFTC would get reports about large trades in the over-the-counter markets, so it would be able to monitor these markets, something it cannot do now. Should anybody be able to escape from ongoing monitoring of what they do in these markets, big traders? I do not think so. Yet they are in this little loophole that was created. That was the purpose of the loophole, to prevent anybody from looking; keep no records. Therefore, they are not going to be able to catch us, and there will be a weak law so it will not be sustained in court when they try to bring a case.

Another question: Enron is bankrupt. A number of traders have been fined and energy trading is back on the rise. The marketplace seems to be correcting itself. Why is this legislation needed?

It is needed to avoid more problems like we have just had. Although everything mentioned in the question I just asked may be true, there is one other significant fact. The consumers and businesses that paid higher prices have only recovered a small fraction of their losses. It is better to prevent the manipulation and the losses from happening than try to make up for them after they take place. That is the point. What our agencies have shown is there is, up to this point at least, no way for an aggrieved marketplace to recover its losses from fraud and any manipulation. Therefore, it should be our job to see the laws are accurate and in place to prevent this kind of activity from taking place in the beginning. That is where increasing the penalties comes in.

Imagine, a $2,000 penalty for doing this. That is nothing. That is not even a slap on the wrist for multibillion-dollar companies.

How does one respond to the concerns that this legislation will increase costs and uncertainty and scare off investment in the energy markets? It will not. The regulated U.S. commodities

markets are the most successful and reliable in the world. Ever since the agricultural exchanges were first regulated, we have heard dire predictions from commodities traders that regulation will drive business overseas. In fact, the opposite has happened. We have seen a flight to quality as investors seek safe and reliable markets. That is a fact. This helps the market.

Many traders and energy companies have said the actual cost of compliance with this legislation will be minimal.

The final question: Why should energy derivatives be regulated differently or more stringently than financial derivatives? Because we do not touch financial derivatives. Mr. Greenspan, please know that.

The price of energy derivatives can be manipulated by manipulating the supply of the underlying energy commodity. The price of financial derivatives is very difficult to manipulate because it is difficult to manipulate the price of financial measures underlying the instruments, which generally are not commodities but abstract financial measures such as interest rates and currency exchange rates.

Then again, in 1999, the President's working group saw this. They recommended they not put energy into the loophole. The Congress saw differently and put energy into this loophole, and the never-never land of secrecy went on. These bogus trades were enabled. These bogus trades took place.

There are cases being brought, and we are even finding that the law is inadequate because a court has said it is too vague. We correct that.

I think this is really an important amendment. I do not think I could live with myself if I did not try to do it. If we lose today, believe me, I will come back again and again, because we saw what happened. We know there was massive fraud and manipulation. We know the loophole was there. We know there is no transparency, no record, no audit trail, and no antifraud and antimanipulation oversight for any over-the-counter energy trade. That is what we are trying to do.

My colleagues have referred to futures exchanges rather than over-the-counter energy trades, and that is what we are referring to in this bill. Please, I know back here people look at the West and they say, aha, it is not us, but what I say to them is some day it could be them. Do they not want the law right? Do they not want to be protected? Do they not want a record kept so the regulatory agency can look at it? I really hope the answer is yes, and I hope this Senate will vote for this amendment.

If there are no further comments, I will yield the remainder of my time. If there are, I reserve the remainder of my time.

The PRESIDING OFFICER. The Senator from Utah.

Mr. BENNETT. Mr. President, I understand there will be a response on this side so I would recommend to the Senator from California that she hang on to all the cards she has.

Mrs. FEINSTEIN. I thank the Senator. I will do that.

Mr. BENNETT. I yield 10 minutes to the Senator from Idaho.

The PRESIDING OFFICER. The Senator from Idaho is recognized.

Mr. CRAPO. Mr. President, I would like to respond to some of the points my colleague from California has made and try to further clarify some of these issues. It appears there may be a difference of understanding between us as to just what the CFTC actually has jurisdictional authority over. My colleague from California has indicated that the antifraud and antimanipulation provisions in the Commodities Futures Modernization Act do not apply to over-the-counter trades. My understanding is very different from that. In fact, it is my understanding that the CFTC has antimanipulation authority that allows the Commission to obtain books and records from any market participant when the CFTC believes the prices are being manipulated. In fact, as I had indicated in my previous comments, enforcement authority with regard to market manipulation and price manipulation is being undertaken with regard to Enron.

The question here is whether there is a standardized set of books and records that are required of each participant. In that case, that is correct; the act does not put the full level of regulation onto those in the energy derivatives markets, only on agricultural commodities. So that might be the difference we are talking about. But the fact is, the distinction here is whether there is an exchange type of document disclosure as opposed to simply the type of document disclosure that the CFTC can ask for if it is investigating alleged price manipulation.

Second, the Senator from California indicated that she believed the penalties were too soft, and her legislation addressed that issue. I suppose there is not a lot of disagreement. I have not really talked with other Members of the Senate about it. I don't know if there is a lot of disagreement in strengthening the penalties, but that is not really all this amendment does. In fact, it is not really the focus of this amendment. What this amendment does, as I said before, is it increases and creates an entirely new regulatory regime for the management of derivatives transactions in energy.

I think this next point is a very critical point that we need to address. The Senator from California said in 1999 the working group said that energy transactions should not be excluded from the act. I am not familiar with the exact quotation or document that is being referred to there. But if the word ''excluded'' is the word the President's working group used, then that makes sense because, as I said earlier in my remarks, the act that we established after the President's working group went through its analysis created three different categories: Those that were included, those that were excluded, and those that were exempted. Why they use the word ''exempted'' as opposed to some other category, I don't know. But there is a real distinction in this law between the word ''excluded,'' which means they are not covered, and the word ''exempted,'' which means they are not required to be registered on an exchange.

Those that are in the exempted category are not excluded, which is what the 1999 working group apparently recommended for energy. Energy transactions in derivatives are not excluded, they are exempted, which means they, along with every other commodity transaction except for agricultural and financial transactions, are required to be subject to the reporting and investigatory antifraud and antimanipulation provisions of the act. That is what we are debating here.

Finally, the Senator from California mentioned a case where the court did say there was a sufficient lack of clarity in the act that it could not be enforced against knowing and willful conduct. That is correct. That case, to my knowledge, is one of the only, if not the only, case in the country where there has ever been a court ruling that did not give the CFTC the authority it needs to go after this type of conduct.

As I indicated in my earlier remarks, the Energy bill, which we are now putting together in the Energy conference, is correcting the problem that came up with that case. I actually have the language in front of me that is being changed in the law to address the concern raised by that case.

So because there is a case where the court said the language needs to be tightened up a little bit, that does not mean we then need to create a whole new regulatory regime for the management of derivatives. What it means is we need to correct that problem that the case law pointed out in the statute to be sure that the antifraud and antimanipulation language is able to be enforced as we intended it to be. That is exactly what the chairman of the Energy Committee and the others of us who submitted this letter have stated is being corrected in the Energy bill.

Then just one final comment. There was some question as to whether Mr. Greenspan or those of us on this side were making a distinction between financial derivatives or energy derivatives. I can assure those who were involved in the debate on all sides that Chairman Greenspan, as well as the rest of us, understand that we are talking about different types of derivatives when we talk about financial derivatives or energy derivatives or agricultural derivatives or other types of transactions in these commodities. The fact is, whether it is agriculture or energy or financial or other types of commodities, the manner in which we regulate them has incredible impacts on the way in which the markets operate.

I will conclude my remarks at this time by asking unanimous consent to have printed in the RECORD a letter which was delivered to me today, again by Alan Greenspan, responding this third time to the issue, and discussing the reasons our market needs to retain its resilience as we deal with the management of different types of very sophisticated transactions like these derivatives transactions.

I ask unanimous consent this letter be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

BOARD OF GOVERNORS,
FEDERAL RESERVE SYSTEM,
Washington, DC, November 5, 2003.

Hon. MICHAEL D. CRAPO,
U.S. Senate,
Washington, DC.

DEAR SENATOR: You have asked me for my views on Senator Feinstein's latest proposal for additional regulation of energy derivatives. By imposing large trader reporting requirements on bilateral transactions in energy commodities, the proposal would take the first steps toward introduction of an ex ante prophylactic regulatory regime for the OTC energy derivatives markets. Such a regime would undermine market discipline to the extent that market participants come to depend on the Commodity Futures Trading Commission (CFTC) to protect their interests and therefore fail to do more to protect themselves. Reliance on market discipline rather than government regulation has allowed derivatives markets to allocate risks very flexibly and effectively, which has contributed importantly to the resiliency of our financial system and our economy.

In my view, concerns about market manipulation in the energy derivatives markets would be addressed more effectively by a combination of: (1) enhanced market discipline on the processes through which price data are gathered and price indexes are constructed, and (2) more vigorous exercise of the CFTC's existing ex post enforcement authority with respect to market manipulation. Some clarification of the CFTC's enforcement authority would be desirable, but it is not at all clear that the provisions in the proposed amendment are the best way to accomplish that goal.

Sincerely,

ALAN GREENSPAN.

Mr. CRAPO. With that, I withhold my further remarks. I suspect we may need to get into a little bit of debate on these issues, and that may help us to bring focus on what the differences and concerns we have are. But I withhold further remarks at this time.

The PRESIDING OFFICER (Mrs. DOLE). The Senator from California.

Mrs. FEINSTEIN. Madam President, I would like to respond to the Senator. I think this discussion is constructive and I am pleased to partake in this exchange with my good friend from Idaho.

This is a report entitled ''The Over-the-Counter Derivatives Market in the Commodity Exchange Act'' which was written by the President's working group on financial markets in 1999.

On page 16 of that report, it goes on to say—and I want to read it in its context:

Due to the characteristics of markets for nonfinancial commodities with finite supplies—

Which energy would be one—

the working group is unanimously recommending that the exclusion—

In other words, the loophole—

not be extended to agreements involving such commodities. For example, in the case of agricultural commodities, production is seasonal and volatile and the underlying commodity is perishable, factors that make the markets for these products susceptible to supply and pricing distortions and to manipulation. There have also been several well known efforts to manipulate the prices of certain metals by attempting to corner the cash or futures markets. Moreover, the cash market for many nonfinancial commodities is dependent on the futures market for price discovery. The CFTC, however, should retain its authority to grant exemptions for derivatives involving nonfinancial commodities as it did in 1993 for energy products, where exemptions are in the public interest and otherwise consistent with the Commodities Exchange Act.

Then the loophole was promulgated. The section of the Commodities Exchange Act which contains that loophole is section 2(g) and is titled, ''Excluded Swap Transactions.''

The section reads, No provision of this Act (other than section 5a (to the extent provided in sections 5a(g)), 5b, 5d, or 12(e)(2) shall apply to or govern any agreement, contract or transaction in a commodity other than an agricultural commodity if agreement, contract or transaction is . . .

And then it goes on.

This section in the Commodities Exchange Act is what creates the loophole, and that is the problem that we are trying to correct in this legislation. I believe we do correct it.

Again, it is very hard for me—and this might have something to do with the fact we went thorough it the west—to understand why we would not want to deter this activity and strengthen the rules to prohibit such manipulation from happening in the future.

We want to be very certain that with all of this kind of trading, including over the counter trades and electronic trades, that the records are kept and there is an audit trail clearly exists and there is an opportunity for the Commodity Futures Trading Commission to note something may be wrong and hold the proper investigation. This is no more and no less than what exists on the exchange today.

Why should this secret world of trading be allowed to exist? I know people get rich through it. This secret trading world allows people to get rich by engaging in fraudulent trades, as was seen during the Western energy crisis. It is this type of manipulative behavior that we are trying to stop.

I can't understand why the administration would not want to support this. When Mr. Greenspan came in and talked to me a few years ago when we first proposed this legislation, his main concern was financial derivatives. This is why we made certain, as I have said in my comments, that this legislation does not concern financial derivatives. He may well have expanded his view to all kinds of over-the-counter trades since then, but at the time I sat down and met with him, that was not his position.

Regardless, we are talking about public policy. We are talking about protecting the people of America. We are talking about strengthening the law so that what happened on the west coast can never happen in the Midwest or on the east coast or any part of the nation.

I mentioned what the attorney general of the State of New York—the attorney general, not a deputy—Mr. Spitzer, has written. Once again, let me read what he said. He is the one who prosecutes many of these cases and I really think his views in this area should make a difference.

He says:

I urge your amendment's adoption. In addition to providing wholesale electricity markets, the transparency vital to effective competition, the amendment closes loopholes used to manipulate energy markets. It improves the ability to detect fraud and other manipulation, and it deters manipulation by establishing substantive penalties.

This is the attorney general of the State of New York who is going to be prosecuting many of these cases. He says it is a wise thing to do, it is a prudent thing to do, and you should do it.

He also says that this amendment makes a major contribution to competitive energy markets by initiating an electronic information system to be operated through the Federal Energy Regulatory Commission. I have already talked about this. Earlier, I said how this legislation will provide open access to comprehensive, timely, and reliable wholesale electricity and transmission prices. The attorney general repeats that. He says:

The reliability of market information would be markedly improved by the amendment's—

Don't we want that? I think so—

general prohibition on manipulation of the purchase or sale of electricity, or the transmission services needed to deliver electricity and by the specific prohibition of the round trip trading manipulation used so effectively to inflate electricity prices to the public's injury.

This is the prosecutor in one of the main States that would have this kind of litigation.

Then he goes on to say:

Enforcement of the law and regulation safeguarding our energy markets would be greatly aided by other reforms the amendment provides. The amendment would repeal the so-called Enron exemption which shields large energy traders from oversight.

Once again, I want to iterate that this is the attorney general of New York speaking.

In addition, the amendment would apply to anti-manipulation and anti-fraud provisions of the Commodity Exchange Act—

I just read to this provision to you. Clearly this section of the Act is inadequate by anybody's reading to effectively regulate all energy transactions—

Our legislation would improve the Federal Energy Regulatory Commission's ability to

address complaints, and it would lift the restriction on the Federal Energy Regulatory Commission's authority to order refunds. These reforms will make accountable parties, which are currently beyond the law's reach accountable for their actions and will increase recovery of overcharges.

Once again, I ask, don't we want to do this? Do we really want to protect these people who are willing to do such harmful things to the American people?

I am shocked at the administration's letter. I thought they were there to protect the public.

I thank the Chair. I reserve the remainder of my time.

The PRESIDING OFFICER. The Senator from Utah.

Mr. BENNETT. Madam President, I yield an additional 10 minutes to the Senator from Idaho and allow him to yield back whatever time he might decide not to use.

The PRESIDING OFFICER. The Senator from Idaho is recognized.

Mr. CRAPO. Thank you very much, Madam President. I will try to be brief.

I wish to respond to what really has become the one focal point in the discussion we have been having over the last few minutes; that is, whether the Commodity Futures Trading Act applies and provides tools to protect against over-the-counter trades and derivatives. There isn't any difference between us in regard to that.

The Senator from California said: Would we want to protect people who would do all of these bad things? She indicated from the letter she read from the attorney general of New York that we were shielding large over-the-counter trades from oversight. I will simply say again that this is not the way the laws have been interpreted by the authorities of the government who administer this act, and it is not the way the law has been interpreted by those who were involved in writing the act. Frankly, with the exception of one case of a word change correction in the energy conference bill to address the issue—with the exception of that one case, to my knowledge, there is no indication that the CFTC does not have authority to regulate these trades.

Let me go on. I will go back to the letter of June 11. This is a letter from the Department of the Treasury, the Board of Governors of the Federal Reserve System, the U.S. Securities and Exchange Commission, and the Commodity Futures Trading Commission in which they state they were aware that one of the arguments was they do not have the authority or that adequate regulation is not taking place.

This is a letter written to me and to Senator ZELL MILLER, whom I commend for his efforts in this matter. They state in the letter:

> As you know, the Commodity Futures Trading Commission has brought formal actions against Enron, Dynegy, and El Paso for market manipulation, wash—roundtrip—trades, false reporting of prices, and operation of illegal markets.

If they don't have the authority under the act to regulate price manipulation or other market manipulations, then how could they have brought formal actions to enforce it? Not only do they bring formal actions but the Securities and Exchange Commission, the Federal Energy Regulatory Commission, and the Department of Justice have also initiated formal actions in the energy sector.

At the time of this letter, which was last June, they indicated:

> Some of these actions have already resulted in substantial monetary penalties and other sanctions. These initial actions alone make clear that wrongdoers in the energy markets are fully subject to the existing enforcement authority of Federal regulators.

We can debate about whether we should increase the penalties or add more regulations on top of this, but the fact is that under the Commodity Futures Trading Act, anti-price-manipulation and other antifraud provisions are enforceable.

I wish to go back also to one other comment the Senator from California made. She read to us out of the 1999 report of the President's working group. I listened very carefully to the words she was reading because it is important to understand the usage of words by the President's working group.

I will go back again to when the President's working group recommended how to create this statutory system. When Congress adopted that recommendation and made it law, we created three categories—included, exempted, and excluded. What this working group language which was read to us said was that due to the characteristics of nonfinancial commodities, exclusion was not intended or not recommended.

That is exactly, in fact, what we did in the law. We did not exclude the energy sector. We put it in the middle category, which is exactly where their working report said it should go. It said they should have authority to be exempted. It was put in the ''exempted'' category which, again, although that exempted word makes it sound as if they are excluded, is not the way the wording of the statute works. The exempted category is fully subject to antifraud and antiprice manipulation protections and to record-reporting requirements imposed by the CFTC.

Again, we may have a difference of opinion on where the reach of the law is, but the bottom line is the agencies involved in administering these and other laws are fully enforcing the law.

I conclude by reading one further letter sent to the Honorable BILL FRIST and TOM DASCHLE yesterday by a number of associations. I will read the names of the associations. These are not just energy companies but companies, associations, and groups involved with the management of our economy from many different perspectives. They point out that the President's working group's approach, which we have been debating today, has been applied and that enforcement actions are taking place. In their words:

These actions make it clear that wrongdoers in the energy markets are fully subject to the significant authority of federal and state authorities.

Again, in their words:

> Led by the CFTC, federal and state authorities are currently investigating 32 companies and since last year the Commission has entered into six settlements collecting a total of $96 million in civil penalties from energy companies and power merchants for attempting to manipulate energy prices.

Again, if they do not have the authority to regulate, they are certainly doing a good job of regulating. They have collected over $96 million in civil penalties and continue to enforce the act.

Signers of this letter are: the American Bankers Association, the ABA Securities Association, the Association for Financial Professionals, the Bond Market Association, EMTA, the Financial Services Roundtable, the Foreign Exchange Committee, the Futures Industry Association, the International Swap and Derivatives Association, the Managed Funds Association, the National Mining Association, and the Securities Industry Association.

I bring that up simply to point out that not only are those agencies in our Government—such as the Department of the Treasury and the CFTC and the Federal Reserve and others—concerned about this, but those in the industry, those operating in our financial industries are concerned about what this will do to our economy and the resilience of our ability to manage risk in our economy.

One of the factors that gives us the ability to have the strongest economy in the world is our ability to utilize these types of transactional authorities to allocate risk in a way that gives us the resiliency to defend against the kinds of threats against our economy we faced over the last few years.

I yield back the remainder of my time.

The PRESIDING OFFICER. Who yields time?

Mr. BENNETT. Madam President, what is the time situation?

The PRESIDING OFFICER. The Senator from Utah has 3 minutes 16 seconds and the Senator from California has 2 minutes 15 seconds.

Mr. KOHL. Madam President, I would like to make a brief statement on this amendment. This is a complicated issue.

The PRESIDING OFFICER. Who yields time?

Mrs. FEINSTEIN. I would be very happy to yield my 2 minutes to the ranking member if I might have 3 minutes to conclude.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. KOHL. This is a very complicated issue. This is an issue on which the Senator from California has spent a lot of time. I believe she knows it thoroughly. Her proposal would bring more transparency to the derivatives market, something we should all support. With above-board transparent

markets, derivatives trading will never be taken seriously and investors will always be at risk of being taken advantage of. I will be supporting the Feinstein amendment. I urge fellow Senators to do the same.

The PRESIDING OFFICER. Who yields time?

Mrs. FEINSTEIN. Madam President, there really is a difference of opinion. I would like to have the time to read part of the transcript in a hearing on the Committee on Agriculture on July 10. A question that Senator CRAPO asks to Mr. Newsome of the CFTC.

Senator CRAPO: I know we have been over this before but I want to be sure that I have it right. As I listened to the testimony of both of you it seems to me that there is actually a lot more agreement than disagreement with respect to what we ought to be doing and where we ought to be. The disagreement, as I understand it, is over whether 2G excludes from the fraud and manipulation provision swap transactions.

Now, swap transactions are the dominant majority of what goes over the over-the-counter market.

I am correct about that. Would the two of you agree that is the core of the disagreement between your testimony?

Mr. Newsome: 2G certainly does exclude swap transactions.

That is my point. And he is testifying to it in this committee that this is not covered by the CFTC.

It goes on.

Senator CRAPO: It excludes them from fraud and manipulation protections.

Mr. Newsome: 2G excludes them from jurisdictions of the CFTC.

The PRESIDING OFFICER. The Senator from Utah.

Mr. BENNETT. Madam President, I yield 2 minutes to the Senator from Wyoming.

Mr. ENZI. Madam President, I rise to oppose this issue.

I ask unanimous consent that an article from the Wall Street Journal that explains how small firms are potentially affected by this amendment, a way that small firms have had for hedging so they could stay in business in markets that fluctuate dramatically so they could keep a level price for consumers and still make a profit, be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

[From the Wall Street Journal, Nov. 3, 2003]

SMALL FIRMS ARE TURNING TO FINANCIAL FUTURES FOR FUEL

(By Russell Gold)

DALLAS.—Deregulated energy markets have taken their fair share of criticism in recent years. But that hasn't scared off some of the nation's small-business owners, who are betting that the wild and woolly world of the financial-futures markets will provide more price stability than the stodgy regulated utilities.

That's a big departure. Typically, small businesses have relied on the regulated utilities for their energy needs. But in the past three years, natural-gas prices have surged and the regulated utilities have been slow to find ways to put a lid on the trend. That's opened the doors to marketers that can use financial derivatives and fixed-rate contracts to offer stable pricing for customers.

By the end of this year, an estimated 550,000 commercial clients nationwide will have purchased fixed-price, natural-gas contracts through energy marketing middlemen, according to Kema, a consulting firm in Fairfax, Va., that researches retail-energy markets. That represents a 10% increase from two years ago. ''We are seeing slow and steady growth'' in small businesses switching from utilities to deregulated energy marketers for fuel supplies, says Kema's natural-gas research director, Gerry Yurkevicz.

LOCKING INTO FIXED PRICES

In the past, only large industrial companies would take such risks. But an increasing number of small and midsize businesses, including property managers, hospitals and fast-food franchises, are locking in a fixed price rather than watching their energy bills gyrate from month to month. If they're lucky, they will save money on fuel. But if a warm winter causes prices to collapse, they may end up spending more on natural gas than what utilities would charge.

But for most small businesses, natural-gas marketers have something to offer besides the possibility of lower prices: They can offer near-term price stability. This allows businesses to set their energy budgets for the year and not worry.

Mark Beffort, president of a real-estate-management concern in Oklahoma City recently made the switch. Instead of buying natural gas from the local utility for a 22-story suburban office tower he manages, he works with natural-gas marketer Clearwater Enterprises LLC. This past fall, Mr. Beffort called Clearwater and chewed over whether to but natural gas for the winter or wait. ''Do we want to lock or do we want to gamble?'' he asked. Last month, a government report on levels of natural gas stored in reservoirs for winter use sent natural-gas prices down. At the urging of Clearwater, Mr. Beffort bought on the drop. He orally agreed to take enough natural gas to heat the office tower at a fixed price. Clearwater then locked in supply using a combination of futures contracts and fixed-price deals with producers.

''Customers can fix their energy budgets at the beginning of the year,'' Mr. Yurkevicz says. ''They can set it and forget it.'' By contrast, regulators set up rules that discourage utilities from hedging, making retail prices almost as volatile as natural-gas prices.

For most of the 1990s, natural-gas prices, as measured by tradable futures contracts on the New York Mercantile Exchange, held stable at about $2.50 per million British thermal units. Since 2000, however, the price has whipsawed, and the average cost so far this year has exceeded $5 per million BTUs.

Many marketing firms are targeting smaller and smaller commercial customers. Peoples Energy Services, a unit of Chicago-based Peoples Energy Corp., reported it number of commercial clients jumped 20% to 13,073 for the year ended Sept. 30. Meanwhile, the company's average customer usage decreased by 9% to 3.2 million cubic feet, as the energy marketer takes on more smaller customers.

UGI Energy Services, a subsidiary of suburban Philadelphia-based UGI Corp., has more than quadrupled its number of customers since 1999. Over the same span, its average customer usage has dropped 13%, to 23 million cubic feet. ''We view ourselves as risk managers,'' says UGI Energy Services President Bradley Hall. ''What most people are looking for its stability.''

SWITCH TO PROPANE

That's what attracted customer Jeff Uhlenburg. His family-owned industrial furnace in Philadelphia had spent more than six months of its energy budget by mid-March, and high natural-gas prices forced him to switch to propane. ''I got burned,'' he says. This summer, he switched to UGI, which buys natural-gas futures and supplies Mr. Uhlenburg natural gas at a fixed price.

Rather than fighting the trend, some regulated utilities are encouraging their customers to switch. The utilities continue to profit from transporting the natural gas. And often, the utility and energy marketer share a common corporate parent.

Oklahoma Natural Gas Co., a regulated utility owned by Oneok Inc., gained approval from the state earlier this year to permit even smaller customers than previously allowed to switch to third-party marketer. The 97-year old utility last month began asking commercial clients as small as dry cleaners for permission to send their contact information to marketers. Oneok is hoping that commercial customers will choose to sign up with its unregulated subsidiary, Oneok Energy Marketing Co., to provide their natural gas.

Mr. ENZI. I know this is a glaze-the-eyes-over issue. It is hard for me to understand. It is probably hard for me to be able to spell derivatives, let alone understand paragraphs A, B, C, D, G, or whatever they were.

This amendment has come up twice before. We voted it down twice before. There have been some changes to pick up a little bit more of a majority. As the letter read by the Senator from Idaho pointed out, the industries that were excluded in this have not bit into it yet. They understand it is a slippery slope and they will come back up and pick them up.

The SEC has brought action against these companies. If Sarbanes-Oxley had been in place a year before the time that it was, we would not have had any problem. There are protections out there. So let's not take this advantage away from the small businesses.

The proponents of the amendment believe that the trading of derivatives, especially in the energy area, were the cause of the energy problems faced by western States in recent years. Specifically, the proponents believe that energy trading of derivatives by Enron contributed significantly to the energy problems.

Unfortunately, the problems that caused Enron to fail were based upon failures in corporate governance and outright fraud. Ironically, we are addressing this amendment after we celebrated the 1-year anniversary of the passage of the Sarbanes-Oxley act in July. If that act had been in place earlier, the problems of Enron, and companies like Enron, would have been discovered by the independent directors and effective auditors required by the law.

Proponents of the amendment also would have us believe that Federal regulators do not have enough power and authority to seek out and punish the wrong doers. That is simply not true. Three Federal agencies have brought enforcement actions as a result of the activities of Enron and companies like Enron and the Department of Justice has instituted investigations into the matter.

Two weeks after we defeated the amendment in June, the Federal Energy Regulatory Commission issued two ''broad show cause'' orders to over 60 power trading companies that are alleged to have engaged in manipulative practices that disrupted the western energy markets in 2000 and 2001.

In addition, the Commodities Futures Trading Commission documented administrative and criminal actions of the energy trading industry in the agency's, ''Report on Energy Investigations'' that was released on April 9 of this year.

Finally, in late July, the Securities and Exchange Commission settled enforcement proceedings in the amount of $255 million against two investment banks that conspired with Enron to commit fraud. This is not the first action by the Securities and Exchange Commission in this area. In total, the Securities and Exchange Commission has brought six separate actions in connection with the Enron matter.

In addition, the Federal agencies are not sitting idle. In particular, the Federal Energy Regulatory Commission has regulatory initiatives to provide greater clarity and transparency to the energy markets.

It is abundantly clear that the Federal agencies are acting where appropriate and are using their full authority to pursue those who commit fraud on the energy and securities markets.

During the debates on the June 11 amendment, the President's working group, which is comprised of the Chairman of the Board of Governors of the Federal Reserve, the Secretary of the Department of the Treasury, the Chairman of the SEC, and the Chairman of the CFTC, sent a letter to opposed the amendment. In the letter, the working group stated that the June 11 amendment ''could have significant unintended consequences for an extremely important risk management market—serving businesses, financial institutions, and investors throughout the U.S. economy.''

On July 16, Chairman Greenspan testified before the Senate Banking Committee on the state of monetary policy. In response to question posed at the hearing, he reiterated his opposition to the amendment.

As I stated on June 11, as we debated this amendment before, I believe that the amendment is overly broad and if adopted will likely decrease market liquidity because of increased legal and transactional uncertainties. In addition, I am suspect of this amendment as it includes a carve-out for the metals industries. Congress should be very cautious about carve-outs as it may start out to be a slippery slope where the initial carve-out is for the metals industry. The next move will be to exempt other industries until there are enough votes to pass an amendment—then the process well reverse to pick up the exemptions.

Instead of cutting the throats of particularly small companies, this will be the death by a thousand small slices. Derivatives are protecting hedging for small companies and it works. Evidence of small business use of energy financial products on energy issues can be seen in the November 3 article of the Wall Street Journal entitled, ''Small Firms are turning to Financial Futures for Fuel.'' I also would like to acknowledge the financial services industries opposition to this amendment.

For every reaction Congress tends to have an overreaction. I believe that this is the case here. The Commodities Futures Trading Commission already oversees market manipulation concerns with the energy trading markets. The pursuit of a new broad-based regulatory scheme for the oversight of energy trading may be an unnecessary addition to the market.

Accordingly, I urge my colleagues to vote against this particular amendment as they have voted it down twice before.

Mr. BENNETT. Madam President, as I have listened to this debate, it has reminded me once again of why I am glad I did not go to law school. The details of the legislation are best left to the lawyers who have argued it.

I simply share with my colleagues a conversation I had when the question of derivatives arose with respect to the bankruptcy of Orange County in California. There was an attempt at that point to say we must regulate these derivatives. Derivatives are terrible. Derivatives are responsible for all of our troubles. Chairman Greenspan was asked pointblank if derivatives were responsible for the bankruptcy in California. He said no, all derivatives did was make the stupid actions of the treasurer of Orange County be carried out more effectively than would have been the case without them.

We must remember that derivatives are neutral. They are tools to be used by managers to hedge risks and to make things move more efficiently in the marketplace. We sometimes move away from that understanding and think they are inherently evil in and of themselves.

I accept the assurances that the trading in this area is appropriately managed by the regulatory agencies that have been set up and I intend to oppose the amendment. I urge my fellow Senators to do the same.

Mrs. FEINSTEIN. I ask unanimous consent for 1 minute to permit Senator CANTWELL to speak.

The PRESIDING OFFICER. Without objection, it is so ordered.

The Senator from Washington.

Ms. CANTWELL. Thank you, Madam President.

Madam President, I come to the floor to support the Feinstein amendment. I think Senator FEINSTEIN has done an outstanding job of trying to communicate what is essential for markets to operate efficiently. For markets to operate efficiently, they need transparency. That is what the underlying amendment does.

It says, let's make these commodities have the same transparency as other products on the market that are sold as futures, have the ability to look at the books, and make sure that manipulation has not happened.

I urge my colleagues to support the Feinstein amendment.

The PRESIDING OFFICER. The Senator from Utah.

Mr. BENNETT. Madam President, I move to table the amendment and ask for the yeas and nays.

Mr. LEVIN. Will the Senator withhold for a unanimous consent request?

Mr. BENNETT. I will withhold.

Mrs. FEINSTEIN. Madam President, I have a copy of a colloquy between the leaders that we would have an up-or-down vote on the amendment.

Mr. LEVIN. Madam President, while that is being considered, I ask unanimous consent that a statement of the American Public Gas Association, supporting the amendment; a statement of Attorney General Eliot Spitzer, supporting the amendment; a statement of the North American Securities Administrators Association, supporting the amendment; a statement from the Consumers Union, Consumer Federation of America, U.S. Public Interest Research Group, and Public Citizen, supporting the amendment; and a statement from the Derivatives Study Center be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

AMERICAN PUBLIC
GAS ASSOCIATION,
Fairfax, VA, October 8, 2003.

Re protecting electricity markets and consumers.

Hon. RICHARD LUGAR,
Hart Senate Office Building,
U.S. Senate, Washington, DC.

DEAR SENATOR LUGAR: The American Public Gas Association (APGA) is very pleased that you and Senators Levin and Feinstein are leading a bipartisan effort to ensure that energy prices are determined in a competitive and informed marketplace. The provisions in your ''Energy Market Oversight Amendment'' are significant steps toward closing the gaps that impede effective federal oversight of the energy marketplace. We strongly support the changes you propose to the Commodity Exchange Act (CEA) and the Federal Power Act (FPA). We also urge that you amend the Natural Gas Act (NGA) in the same manner as the FPA so natural gas markets and consumers are provided the same level of protection you propose for electricity markets and consumers.

APGA represents the interests of municipally-owned gas utilities. There are over 950 public gas systems across the country in 36 states serving more than five million residential and commercial customers. APGA represents over 600 of these public gas systems. Our members are not-for-profit utilities, and their boards are composed of locally elected and appointed officials. No other trade association in the gas industry is closer to the customers they serve than APGA members. And, on behalf of APGA, we strongly support your amendment because it will improve market transparency and provide the essential regulatory oversight to detect and prevent manipulation and improve the efficiency of energy markets. Greater

transparency and effective oversight are the basic steps necessary to restore confidence in the energy markets and promote the investments needed to provide reliable energy at fair prices to consumers and businesses.

We applaud your efforts and your goals: to improve transparency, strengthen enforcement, and preclude manipulation in energy markets. Fundamental to achieving these goals is to undo the special exclusions and exemptions granted in the closing hours of the 106th Congress. The amendments to the CEA you now propose are focused specifically on energy markets and will provide a basic level of protection for all energy consumers because the provisions clearly establish anti-fraud and anti-manipulation authority in the over-the-counter derivatives contracts for energy commodities.

However, we urge you to include changes to the NGA that are consistent with your changes to the FPA. Unless such changes are made in tandem, there will be even further disparity between the consumer protection provisions in these two important acts. We hope that such disparate treatment will not be tolerated.

Again, public gas utilities and the hundreds of communities we serve commend you for your thoughtful and deliberate leadership on this very important issue. While there may be some who will oppose this amendment, one need not look far to see whether the opposition is looking out for the best interests of Wall Street or Main Street. We pledge to work with you in any way we can to pass this much-needed amendment. Please let me know how I can assist you.

Sincerely,

BOB CAVE,
President.

STATE OF NEW YORK,
OFFICE OF THE ATTORNEY GENERAL,
New York, NY, October 15, 2003.

Hon. TED STEVENS,
Chairman, Appropriations Committee, U.S. Senate, Washington, DC.
Hon. ROBERT C. BYRD,
Ranking Member, Appropriations Committee, U.S. Senate, Washington, DC.
Hon. ROBERT BENNETT,
Chairman, Subcommittee on Agriculture, Rural Development, and Related Services, Appropriations Committee, U.S. Senate, Washington, DC.
Hon. HERB KOHL,
Ranking Member, Subcommittee on Agriculture, Rural Development, and Related Services, Appropriations Committee, U.S. Senate, Washington, DC.

DEAR SENATORS: I firmly support your efforts to make our energy markets competitive and to protect those markets from fraud and manipulation. The Energy Market Oversight Amendment, sponsored by Senators Feinstein, Levin and Lugar and under consideration as an amendment to the pending 2004 Agriculture, Rural Development, and Related Services Appropriations legislation, is a major step toward both goals. I urge its swift adoption. In addition to providing wholesale electricity markets the transparency vital to effective competition, the amendment closes loopholes used to manipulate energy markets, improves the ability to detect fraud and other manipulation, and deters manipulation by establishing substantive penalties.

The amendment makes a major contribution to competitive energy markets by initiating an electronic information system to be operated through the Federal Energy Regulatory Commission (''FERC''). This system will provide open access to comprehensive, timely and reliable wholesale electricity and transmission price and supply data, greatly expanding the choices of both buyers and sellers. In addition, the reliability of market information would be markedly improved by the amendment's general prohibition on manipulation of the purchase or sale of electricity or the transmission services needed to deliver electricity, and by the specific prohibition of the ''round trip trading'' manipulation used so effectively to inflate electricity prices to the public's injury.

Enforcement of the laws and regulations safeguarding our energy markets would be greatly aided by other reforms the amendment provides. The amendment would repeal the so-called ''Enron exemption,'' which shields large energy traders from oversight. In addition, the amendment would apply the anti-manipulation and anti-fraud provisions of the Commodity Exchange Act to energy transactions, would improve FERC's ability to address complaints, and would lift a restriction on FERC's authority to order refunds. These reforms will make accountable parties now beyond the law's reach and will increase the recovery of overcharges.

Finally,the amendment would give effect to the deterrents against energy market abuses. These reforms make FERC penalties more than just a ''cost of doing business.''

The events of the past three years teach that we need better and stronger laws to protect our energy markets. The Energy Market Oversight Amendment would significantly improve our laws and strengthen crucial deterrents against the fraud and other energy market manipulations that have cost our citizens and our economy billions. The national interest would be served by the amendment becoming law as soon as possible.

Sincerely,

ELIOT SPITZER,
Attorney General.

NORTH AMERICAN SECURITIES
ADMINISTRATORS ASSOCIATION, INC.,
Washington, DC, October 27, 2003.

Hon. TED STEVENS,
Chairman, Appropriations Committee, Washington, DC.
Hon. ROBERT C. BYRD,
Ranking Member, Appropriations Committee, Washington, DC.
Hon. ROBERT BENNETT,
Chairman, Subcommittee on Agriculture, Rural Development and Related Services, Washington, DC.
Hon. HERB KOHL,
Ranking Member, Subcommittee on Agriculture, Rural Development and Related Services, Washington, DC.

DEAR SENATORS: The North American Securities Administrators Association is writing to express its support for the Energy Market Oversight Amendment, sponsored by Senators Feinstein, Levin and Lugar. It is our understanding that this amendment will be considered as part of the Agriculture Appropriations bill.

The collapse of Enron, continued reports of fraud, manipulation in the energy markets, and the lack of transparency in over-the-counter (OTC) energy trading underscore the need for this amendment. The Energy Market Oversight Amendment would provide the transparency and regulatory tools necessary to detect and prevent manipulation and improve the efficiency of these markets. Its disclosure requirements will make the energy marketplace more open for all producers and consumers, and the result will be a more sound and efficient market. During this period of market unrest, now is the time to strengthen the oversight of the energy markets.

NASAA supports the Feinstein-Levin-Lugar amendment because it would provide more transparency to the wholesale electricity markets, supply the CFTC with the authority to detect fraud and manipulation, and help to deter wrongdoing by significantly increasing the penalties for violations of the Federal Power Act.

The events of the past three years should be a wake-up call that we need stronger laws to protect the users of our energy markets. This amendment would improve our laws and help to ensure that problems associated with Enron, the Western electricity crisis, and the recent Northeast blackout do not recur. Thank you for your consideration of these 693Y85X views. Please do not hesitate to contact Deborah Fischione House, NASAA's Director of Policy at 202–737–0900, if we may be of assistance to you.

Sincerely,

RALPH A. LAMBIASE,
NASAA President,
Director of Connecticut Securities.

OCTOBER 16, 2003.

DEAR SENATOR: We are writing to urge you to support the bipartisan Energy Market Oversight Amendment, which will be offered during consideration of the Fiscal Year 2004 Agriculture Appropriations bill. This amendment, being offered by Senators Feinstein, Lugar, Levin and others, would go a long way towards addressing the serious problems plaguing the nation's energy markets.

Unfortunately, we have been bombarded with a steady stream of news reports about how electricity traders have unscrupulously manipulated the market to unfairly inflate their profits, costing consumers billions of dollars. More than one trader has admitted to engaging in ''round trip trading'' to artificially inflate prices. Some created transmission congestion in order to be paid to relieve that congestion. Supplies were withheld to drive prices up, resulting in a series of rolling blackouts in California. We are still learning the full extent of the misconduct, and only now are we coming to understand the nature of these schemes.

Today, the loss of trust and confidence in the integrity and creditworthiness of energy and energy derivatives markets has left trading in oil, gas and electricity suffering from a lack of liquidity. If markets are going to be the terrain for setting the price for our key energy products, then it is crucial that they be orderly and efficient. Towards that end this amendment seeks to put an end to this plague of fraud and market manipulation. It will help improve market oversight and surveillance. It will enable the Commodity Futures Trading Commission (CFTC) to detect and deter manipulation. Its disclosure rules will make the marketplace more transparent for all producers and consumers, and the result will be a more sound and efficient market.

Given all this, we believe that it would be irresponsible to weaken consumer protections and cut federal oversight of the electric industry, as both the Senate and House-passed versions of the energy bill would do. That is why the Energy Market Oversight Amendment is so timely. This amendment would:

Improve price transparency in wholesale electricity markets by directing the Federal Energy Regulatory Commission (FERC) to establish an electronic system to provide information about the price and availability of wholesale electricity to buyers, sellers and the general public;

Prohibit round trip trading;

Increase penalties for violations of the Federal Power Act and the Natural Gas Act from $5,000 to $1,000,000;

Prohibit manipulation of the electricity markets, including giving FERC the authority to revoke market-based rates for companies that are found to have engaged in market manipulation;

Repeal the ''Enron exemption'' in the Commodities Future Modernization Act for large traders in energy commodities and apply the anti-fraud provisions of the Commodity Exchange Act to all over the counter trades in energy derivatives; and

Provide the CFTC tools to monitor energy markets, including requiring traders to keep records and report large trades to the CFTC, focusing on transactions that perform a significant price discovery function, while limiting the CFTC to seeking only information necessary to detect and prevent price manipulation in the futures and over the counter markets for energy.

In addition, the amendment would have no effect on futures markets, financial derivatives, metals, swaps or electronic trading of non-energy commodities.

Energy production is a major sector of the economy, but energy's importance is greater than that measured by its size. One of the hard learned lessons from the Western electricity meltdown of 2000 and 2001 is that when energy companies manipulate the electricity markets, devastating consequences result. Billions of dollars were lost and millions of lives were adversely affected. The toll on businesses both large and small was enormous. The impact of the Northeast-Midwest blackout was also immense. Congress should do everything within its power to ensure that such devastation never occurs again, and, if it does, that those responsible are punished severely.

Please protect the nation's electricity markets from further Enron-style manipulations—support the Energy Market Oversight Amendment.

Thank you.

Sincerely,

Adam J. Goldberg, Policy Analyst, Consumers Union.

Mark N. Cooper, Director of Research, Consumer Federation of America.

Anna Aurilio, Legislative Director, U.S. Public Interest Research Group.

Michelle Boyd, Legislative Representative, Public Citizen.

FINANCIAL POLICY FORUM,
DERIVATIVES STUDY CENTER,
Washington, DC, October 22, 2003.

DEAR SENATOR LEVIN: I am writing regarding the Energy Market Oversight legislation being offered as an amendment to the FY 2004 Agricultural Appropriations bill. This important legislation will assume that over-the-counter derivatives markets in ''exempt'' commodities such as energy will be covered by federal prohibitions on fraud and manipulation. It will also help to create energy derivatives markets that are more transparent and thus more efficient. In doing so, this legislation will bring OTC energy derivatives out of the shadows and into the same light of financial disclosure. It will subject these derivatives to some of the same regulations that apply to securities, banking, exchange-traded futures and options and other sectors of U.S. financial markets.

This regulatory assistance comes at a critical time. According to the Federal Energy Regulatory Commission's Director of the Office of Market Oversight, ''energy markets are in severe financial distress.'' Along with the decline in credit quality in these markets, the loss of confidence and trust has led to a ruin in the liquidity and depth of these markets. This legislation will go a long way to address this problem.

Derivatives are highly leveraged financial transactions, allowing investors to potentially take a large position in the market without committing an equivalent amount of capital. Moreover, derivatives traded in over-the-counter markets are devoid of the transparency that characterizes exchange-traded derivatives such as futures, and this lack of transparency introduces a greater potential for abuse through fraud and manipulation.

Derivatives are often combined into highly complex structured transactions that are difficult—even for seasoned securities traders and finance professionals—to understand and price in the market. Enron used such over-the-counter derivatives extensively in order to hide the nature of their activities from investors. The failure of Enron and the demise of other energy derivatives dealers has had a devastating impact on the level of trust in energy markets.

This legislation would help ensure that over-the-counter derivatives markets operate with proper federal oversight which will make the markets more stable and transparent. It is appropriate to place this oversight authority with the Commodity Futures Trading Commission, which, as the principal federal regulator of derivatives transactions since its founding in 1975, will provide oversight, surveillance and enforcement of anti-fraud and anti-manipulation laws. The CFTC has the experience to handle these complex financial transactions and to develop the best rules to implement these protections.

At a time when these energy markets are deeply distressed and the investing public looks skeptically at derivatives trading and firms engaged in derivatives trading, we should take decisive steps to ensure that the public is protected from Enron-like abuses and that derivatives are properly regulated so as to make energy markets more efficient. This amendment is just such a step, and the authors of the legislation deserve appreciation for their work in the public interest.

Thank you for introducing this important legislation.

Sincerely,

RANDALL DODD,
Director.

STATE OF MICHIGAN
OFFICE OF THE GOVERNOR,
Lansing, MI, October 2, 2003.

Hon. CARL LEVIN,
U.S. Senate, Russell Senate Office Building, Washington, DC.

DEAR SENATOR LEVIN: I am writing to express my strong support for passage of the Feinstein-Lugar-Levin amendment to the Fiscal Year 2004 agriculture appropriation bill.

In the aftermath of the massive electricity blackout six weeks ago that affected at least six million Michiganians, I believe all necessary steps should be taken to bolster business and consumer confidence in the nation's energy markets and promote additional investment in reliable energy delivery at a fair price. Your amendment would improve electricity price transparency in wholesale electricity markets, greatly increase criminal and civil penalties for trading violations, prohibit market manipulation and fraud in all energy market sectors, and strengthen day-to-day energy market oversight including over-the-counter market transactions that significant affect energy prices.

By directing the Federal Energy Regulatory Commission (FERC) to establish an electronic price and supply monitoring system and crack down on manipulation in wholesale electricity markets. Congress would be providing new authorities consistent with my testimony before the House Energy and Commerce Committee last month that urged Congress to sharpen the teeth of federal regulators and hold electricity market participants accountable to assure energy reliability.

I appreciate your efforts in the Senate to strengthen federal oversight of energy markets and promote reliable and fairly priced energy that will protect consumers and fuel economic growth.

Sincerely,

JENNIFER M. GRANHOLM,
Governor.

NATIONAL ASSOCIATION OF
STATE UTILITY CONSUMER ADVOCATES,
October 27, 2003.

DEAR SENATOR: The National Association of State Utility Consumer Advocates strongly support the bipartisan Energy Market Oversight Amendment, which will be offered during consideration of the FY 2004 Agriculture Appropriations bill.

The proposal, offered by Senators Feinstein, Lugar, Levin, and others will help fix broken energy markets and give regulators the tools needed to protect consumers from market manipulators.

The amendment improves price transparency, prohibits round trip trading, and increases penalties for Federal Power Act and Natural Gas Act violations. The amendment also prohibits manipulation of the energy market and repeals the ''Enron exemption.''

The nation's consumer advocates urge you to support this important consumer protection amendment.

Sincerely,

CHARLES A. ACQUARD,
Executive Director.

The PRESIDING OFFICER. The Senator from Utah.

Mr. BENNETT. Madam President, as I understand the colloquy, it was either a vote on the amendment or in relation to the amendment, and that a motion to table is determined as being in relation to the amendment.

Now, out of courtesy to the Senator from California, I will not make the motion to table. But I want to make it clear, I am reserving the right to make a motion to table in future situations similar to this. I do not want to be discourteous to her for her understanding, but it is my understanding that I do, indeed, have the right to make that motion.

The PRESIDING OFFICER. The Senator from California.

Mrs. FEINSTEIN. Madam President, the extraordinary courtesy of the Senator is appreciated because he is actually correct. It did say ''in relation to.'' But I quickly accept his offer to have an up-or-down vote.

Mr. REID. Madam President, I ask for the yeas and nays on the amendment.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The question is on agreeing to amendment No. 2083.

The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. REID. I announce that the Senator from North Carolina (Mr. EDWARDS), the Senator from Massachusetts (Mr. KERRY), and the Senator from Connecticut (Mr. LIEBERMAN) are necessarily absent.

I further announce that, if present and voting, the Senator from Massachusetts (Mr. KERRY) would vote ''yea.''

The PRESIDING OFFICER (Mr. ENSIGN). Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 41, nays 56, as follows:

[Rollcall Vote No. 436 Leg.]

YEAS—41

Akaka	Durbin	Levin
Baucus	Feingold	Lugar
Biden	Feinstein	McCain
Bingaman	Fitzgerald	Mikulski
Boxer	Graham (FL)	Murray
Byrd	Harkin	Nelson (FL)
Cantwell	Hollings	Reed
Clinton	Inouye	Reid
Conrad	Jeffords	Rockefeller
Corzine	Johnson	Sarbanes
Daschle	Kennedy	Schumer
Dayton	Kohl	Stabenow
Dodd	Lautenberg	Wyden
Dorgan	Leahy	

NAYS—56

Alexander	Crapo	Miller
Allard	DeWine	Murkowski
Allen	Dole	Nelson (NE)
Bayh	Domenici	Nickles
Bennett	Ensign	Pryor
Bond	Enzi	Roberts
Breaux	Frist	Santorum
Brownback	Graham (SC)	Sessions
Bunning	Grassley	Shelby
Burns	Gregg	Smith
Campbell	Hagel	Snowe
Carper	Hatch	Specter
Chafee	Hutchison	Stevens
Chambliss	Inhofe	Sununu
Cochran	Kyl	Talent
Coleman	Landrieu	Thomas
Collins	Lincoln	Voinovich
Cornyn	Lott	Warner
Craig	McConnell	

NOT VOTING—3

Edwards	Kerry	Lieberman

The amendment (No. 2083) was rejected.

Mr. COCHRAN. Mr. President, I move to reconsider the vote.

Mr. BENNETT. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

NATIONAL CONSUMER CREDIT REPORTING SYSTEM IMPROVEMENT ACT OF 2003—Resumed

The PRESIDING OFFICER. Under the previous order, the clerk will read S. 1753 for the third time.

The bill was ordered to be engrossed for a third reading and was read the third time.

The PRESIDING OFFICER. Under the previous order, the Banking Committee is discharged from further consideration of H.R. 2622, and the clerk will state the bill by title.

The assistant legislative clerk read as follows:

A bill (H.R. 2622) to amend the Fair Credit Reporting Act in order to prevent identity theft, to improve the use of and consumer access to consumer reports, to enhance the accuracy of consumer reports, to limit the sharing of certain consumer information, to improve financial education and literacy, and for other purposes.

The PRESIDING OFFICER. Under the previous order, all after the enacting clause is stricken and the text of S. 1753, as amended, is inserted in lieu thereof.

The clerk will read the bill for the third time.

The amendment was ordered to be engrossed and the bill to be read the third time.

The bill was read the third time.

Mrs. FEINSTEIN. Mr. President, I have decided to vote against the National Consumer Credit Reporting System Improvement Act because, bottom line, this bill reduces the privacy rights of 36 million Californians.

These rights were obtained through the passage of landmark legislation sponsored by Senator Jackie Speier earlier this year in California, which gave consumers the right to tell financial institutions that they don't want their most sensitive personal information shared with hundreds or even thousands of affiliated companies.

This practice—affiliate sharing—can include your most sensitive information—the stocks you own, the certificates of deposit you hold, or the amount of money in your checking account.

Importantly, California's financial industry signed off on Senator Speier's bill, rather than face a ballot initiative, which likely would have succeeded.

Industry executives said at the time that the California bill ''encompasses all aspects of the workability needed to ensure protection of customers' privacy'' and that it is ''a workable, reasonable compromise.'' In fact, the only major reservation expressed about that provision was that the bill did not represent a national standard. But now, given the opportunity to set such a national standard, these same companies worked to wipe out such protections—and I find this conduct particularly concerning. Attached is a letter from Senator Speier that attests to the behavior of California's financial industry.

So in response to calls for a national standard and to protect the rights of Californians, Senator BOXER and I developed an amendment that would have established a strong national standard on affiliate sharing, consistent with California's law, which would have given consumers a real voice in how their personal information is used.

This amendment came up for a vote and, unfortunately, it was defeated. I think time will show that this was the wrong vote, and I have no doubt that this issue will resurface as consumers learn more about the misuse of their most sensitive personal information.

I am disappointed that we did not achieve our main goal of adopting an amendment which would allow consumers to have control over their personal data, but I am pleased that the Senate approved two amendments, which I sponsored along with Senator BOXER, to protect consumers.

The first amendment, authorized by Senator BOXER, which I cosponsored, would give consumers greater protection against unwanted marketing.

Most importantly, the amendment would allow consumers to permanently opt-out of marketing by unrelated affiliates, while the underlying bill would have only limited the opt-out to 5 years. This means that if a consumer asks a corporation not to share information with its affiliates for the purpose of marketing, the affiliate cannot solicit them—forever. Without this amendment, a consumer would have been required to go back to the corporation and reiterate his request after 5 years.

Additionally, this amendment clarified what the bill meant by a ''pre-existing business relationship'', where there was no definition before. With this amendment, a company's affiliate would only be able to market to consumers who have:

One, purchased, rented or leased the seller's goods or services or completed a financial transaction between the consumer and seller, within the 18 months immediately preceding the date of a solicitation; or

Two, inquired about or applied for a product or service offered by the seller, within the 3 months immediately preceding the marketing contact.

Without this clarification, companies might have been able to market to customers who purchased goods as many as 5 or 10 years earlier, or who made the mildest inquiry a few years ago. It is the same definition developed by the Federal Trade Commission in creating a national ''Do Not Call'' registry for telemarketers.

The Senate also adopted a second amendment, which I authored and was cosponsored by Senators BOXER and KENNEDY, that essentially provided a far more encompassing definition of medical information than is contained in current law.

Simply put, this amendment will help ensure that consumers aren't discriminated against based on their medical or health information when they apply for credit, insurance, or employment. The amendment also has the support of the American Medical Association, the American Cancer Society, and the California Medical Association.

The Feinstein amendment would broadly expand the definition of ''medical information'' to read:

Information or data except age or gender, whether oral or recorded in any form or medium, created by or derived from a health care provider or the consumer that relates to:

(1) The past, present or future physical, mental or behavioral health or condition of an individual;

(2) The provision of health care to an individual; or

(3) Payment for the provision of health care to an individual.

This is the same definition of medical information established by the National Association of Insurance Commissioners in 2002. This definition has been implemented in a vast majority of our states.

Even with these modest amendments, however, I cannot support the reauthorization of the Fair Credit Reporting Act.

The Boxer-Feinstein marketing amendment will help prevent consumers from receiving unwanted solicitation, but it will do nothing to limit